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Supreme Court of the United States

OCTOBER TERM 1930.

~~1930 Term No. 711.~~

1931 Term No. 15.

IOWA-DES MOINES NATIONAL BANK,
Petitioner,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF RESPONDENTS.

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IOWA-DES MOINES NATIONAL BANK,
Petitioner,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF RESPONDENTS.

I.

OPINION OF COURT BELOW.

This cause was decided by the SUPREME COURT OF IOWA, on September 26, 1930, and is reported as Iowa National Bank v. Stewart, et al., and six other cases, in the 232 Northwestern Reporter, page 445-470, both inclusive. The case has not as yet been published in the official Iowa Reports.

The opinion is set out in full, including the dissenting opinion in the printed record at pages 1339 to 1397.

II.

FACTS AS TO THIS COURT'S JURISDICTION.

We believe the petitioners have not complied with paragraph 1 of Rule 12 nor with paragraph c Section 2 of Rule 27 of this court. Therefore we give this as a concise statement as to why the jurisdiction of this court cannot be invoked.

This action was begun by filing a petition in the District Court of Iowa in and for Polk County, March 13, 1926, (R. 5). The issues were drawn in that same court and tried in that court before Honorable O. S. Franklin, one of the judges of that Court, November 7, 1927 (R. 171), and the decree and judgment was entered in that Court November, 26, 1928 (R. 107).

From this decree and judgment the appeal was taken to the Supreme Court of Iowa (R. 1339) and the Supreme Court of Iowa affirmed the lower Court September 26, 1930. (R. 1341) 232 N. W. 445. Following this, on October 27, 1930, the petitioners served on these respondents (Appellees in Iowa Supreme Court) their Appellant's Notice of Intention to Petition for Rehearing. (R. 1410) and on the same date—October 27, 1930, the petitioners-appellants there filed the said Appellant's Notice of Intention to Petition for Rehearing together with acceptances of service thereon in the office of the Clerk of the Supreme Court of Iowa. (R. 1409).

There is no further record as to the Notice of Intention to Petition for Rehearing. (R. 1411).

It is from the action of the Supreme Court of Iowa, that the petitioner seeks relief through the Writ of Certiorari. (Petition for Writ—Page 28.)

In the District Court of Polk County,—the trial court—the issues raised among other things were these procedure and jurisdictional questions.

Plaintiff—petitioner here—has a plain speedy, adequate remedy at law.

Remedy, if any, is by appeal to Board of Review.

Mandamus will not lie.

(Par. 6 of Answer. R. 32).

Matter was adjudicated by Board of Supervisors and appeal only remedy. (Par. 2-3 of Division II of Answer. R. 44.)

Matter was adjudicated by action brought in Federal Court and dismissed (Par. 6—Division II of Answer. R. 48).

That by stipulation plaintiff was bound by results and adverse adjudication of Des Moines National Bank v. Fairweather. (Par. 7—Division II of Answer. R. 49).

The Supreme Court of Iowa in this cause held:

> "As to the first class of competing capital, the plaintiffs had an available remedy by appeal to the board of review and further appeal from the board of review to the district court, a remedy to which they resorted, though they did not therein ask for correction on account of the alleged discrimination of which they now complain." (R. 1346). * * * as to competing capital of individuals and foreign corporations, this remedy was available to the plaintiff to correct errors of which they now complain." (R. 1347).
>
> * * * "As to the alleged discrimination in favor of moneyed capital held by individual taxpayers and foreign corporations, the remedy afforded before the board of review and by appeal was available adequate and exclusive." (R. 1348).

The plaintiff-petitioner here—was bound by the adverse decision and judgment in Des Moines National Bank vs. Fairweather, 191 Iowa 1240, 181 N. W. 459, 184 N. W. 313, and on writ of error to the Supreme Court of the United States, 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191, by virtue of a stipulation to "abide the final judgment" in that, then pending, case, and accordingly in plaintiff's case there was entered

"This case is hereby dismissed by plaintiff * * * in accordance with stipulation." (R. 1214).

CONCISE STATEMENT OF CASE.

To be concise in this case is even to appear to be lengthy because of the large record. This statement cannot avoid both statements of issues of law and issues of facts, the proper conclusion of law and fact both being issues.

The nature of the action is not as stated by petitioners (p. 1153), but, we insist, this is an action in mandamus brought by the National Banks against the members of the Board of Supervisors and the County Auditor and County Treasurer of Polk County, Iowa, to compel refunds of certain taxes for the years 1919 to 1922 inclusive, alleged to be the difference between the amounts correctly paid and less amounts they would have been required to pay had there been applied to them certain illegal classification or rates applied to competing individuals and corporations for the same years.

Because we believe accuracy requires a presentation of the issues, as we see them, we submit this statement of,—

THE ISSUES.

On March 13, 1926, the Iowa National Bank, petitioner, filed its PETITION in the District Court of the State of Iowa, in and for Polk County, Iowa, alleging

Plaintiff is a national bank in the banking business in the City of Des Moines, Polk County, Iowa. Defendants are J. M. Stewart, the chairman and the four other members of the Board of Supervisors, the Auditor, and the Treasurer, all Polk County officers.

This is an action in mandamus for an order upon the defendants in their capacities as members of the Board of Su-

pervisors of Polk County, Iowa, and County Auditor and County Treasurer of said county respectively, directing the said defendants and each of them to refund to the plaintiff herein certain taxes erroneously and illegally exacted of the plaintiff by the said defendants, and by the taxing officers of Polk County, State of Iowa, in the amounts hereinafter specified.

"Plaintiff brings this action for itself and in behalf of its stockholders for the purpose of enforcing a duty enjoined upon the defendants in their official capacities." (R. 6).

That the City Assessor in and for each of the years fixed an assessment against the shares of stock of petitioner—corporation, as follows:

1919	$2,024,957.00
1920	2,039,915.00
1921	2,065,[illegible]6.00
1922	1,902,[illegible]3.00

under the heading "corporation stock" upon Form 1 of assessor's roll. The assessment was sustained by the City Council of the City of Des Moines sitting as a board of review.

That the consolidated levy each year and the tax imposed against the shares of stock in plaintiff company were, as follows:

1919—	Consolidated	Levy—	137.8	mills	on 20%	value—	$55,807.52
1920—	"	" —	127.	mills	" "	" —	64,053.64
1921—	"	" —	164.	mills	" "	" —	67,751.68
1922—	"	" —	160.4	mills	" "	" —	61,341.68

That the shares of stock in each of the years was subject to taxation only as provided in Section 5219 of the Revised Statutes of the United States.

That during the years 1919, 1920, 1921 and 1922, the "assessors and taxing officers of Polk County" included in the

tax lists as "moneys and credits" assessments of shares of stock in various corporations engaged in business of loaning money, notes of individuals payable on demand and otherwise, including notes secured by mortgages upon real estate and upon chattel property, and property pledged as collateral, debenture bonds, bills of exchange, circulating notes of national banking associations and other United States legal tender, notes and other securities, being assessments aggregating

For the year 1919—$24,878,698.00
" " " 1920— 48,961,990.00
" " " 1921— 53,024,705.00
" " " 1922— 49,930,861.00

That "the city assessor of the City of Des Moines and the taxing officials of Polk County" habitually, intentionally, systematically and generally included in assessments of moneys and credits assessments against individuals representing money at interest, including notes, bonds, mortgages representing loans of money, and all other securities and evidences of indebtedness that normally enter into banking business and as come into direct competition with banking capital in the loan market of Polk County, Iowa.

That the "taxing officers of Polk County" did habitually, intentionally, systematically and generally include in the total of moneys and credits taxed at 5 mills on the dollar large sums representing the assessed value of shares of stock of corporations engaged in the business of loaning money, in the purchase and sale of notes, mortgages, bonds, discounting commercial paper, in direct competition with national and state banks in the loan market in Des Moines, said corporations being assessed for

1919—$2,000,000.00
1920— 5,500,000.00
1921— 7,000,000.00
1922— 7,000,000.00

That the assessments against such individuals were for

1919—$1,700,000.00
1920— 2,500,000.00
1921— 2,500,000.00
1922— 2,500,000.00

As a result the tax levied under the consolidated levy, instead of what would have been under the 5 mill levy as follows:

1919—	Consolidated—	$55,807.62—	5	mill—	$10,124.79
1920—	"	64,053.64—	"		10,199.58
1921—	"	67,751.68—	"		10,328.03
1922—	"	61,341.68—	"		9,513.92

That the assessments of the corporations in each instance in each year was made upon assessment roll No. 1, listed under the sub-heading "Corporation stock", that the assessment so appeared upon the assessor's roll when presented to the City Council as a Board of Review, and that the assessments were by the assessor and the board of review classified identically as were the assessments of shares of stock of the plaintiff, "and long after the Board of Review had adjourned in each of said years" the assessments of the corporations were placed upon the tax lists "by the taxing officers" as "moneys and credits", and applied a tax at the rate of 5 mills upon the dollar while the shares of stock of plaintiff were taxed at consolidated levy.

That the "higher" rate was prohibited by U. S. Code, Section 5219.

That plaintiff was discriminated against contrary to the provisions of the Iowa Constitution Section 6, Article I, and Section 2, Article VIII, and the 14th Amendment to the United States Constitution.

That in each year the plaintiff appeared before and filed objections to the amount of the assessment because that dur-

ing the years 1919, 1920, 1921 and 1922 by reason of the intentional, deliberate, systematic and general failure of the taxing officers of Polk County and State of Iowa to follow the provisions of Sections 1310 and 1322-1a of the 1931 Code Supplement in the administration of the taxing laws the plaintiff was discriminated against, and was required to bear an undue and discriminatory portion of the tax burdens of the City of Des Moines, Polk County, State of Iowa, contrary to the provisions of the Constitution of the State of Iowa and of the 14th Amendment to the Constitution of the United States as hereinbefore alleged. That such unlawful action of the taxing officers of Polk County, State of Iowa, constituted an unjust and unlawful discrimination in favor of the shares of stock of competing corporations and moneyed capital in the hands of individual citizens, and in favor of the shares of national banks and banking associations as against the shares of the plaintiff. That such deliberate, systematic, intentional and general course of action in the administration of the tax laws imposed an unwarranted and illegal discrimination against the plaintiff and its stockholders in violation of Section 6, Article I of the Constitution of the State of Iowa in that by such action and course of conduct upon the part of the taxing officers of Polk County, State of Iowa, there was granted to the owners of moneyed capital and corporation stock, privileges and immunities which, upon the same terms, were denied to the plaintiff and its stockholders. That such course of action and conduct in the administration of the tax laws by the taxing officers of Polk County was in violation of Section 2, Article VIII of the Constitution of the State of Iowa in that the property of the plaintiff and its stockholders was subjected to taxation at a higher rate than the property of individuals of the same class and character as that of the plaintiff and its stockholders. That such course of conduct in the administration of the tax laws by the taxing officers of Polk County, State of Iowa, constituted a vio-

lation of Section 1 of the 14th Amendment to the Constitution of the United States in that it deprived the plaintiff and its stockholders of property without due process of law, and denied to the plaintiff and its stockholders the equal protection of the law, and that thereby there was cast upon the plaintiff and its stockholders an undue and unjust proportion of the burdens of taxation in the taxing district of the City of Des Moines, Iowa.

That on November 28, 1923, the plaintiff tendered the County Treasurer in payment of taxes at 5 mills, as follows:

For 1919—on	$2,024,975.00	plus	6%	from	Mch	30,	1921—total—		$12,349.96
1920—"	2,039,915.00	"	"	"	"	"	"	"	11,829.10
1921—"	2,065,606.00			"	"	"	1922—	"	11,353.99
1922—"	1,902,783.00			"	"	"	1923—	"	9,892.29
									$45,425.34

and the tender was refused.

That the treasurer demanded plaintiff pay taxes upon its shares at the consolidated levy rate with interest and penalties, and threatened enforcement with seizure and sale of plaintiff's property. To prevent the sale and accumulation of penalties, November 30, 1923, plaintiff under written protest paid the county treasurer

For 1919	Taxes	$55,807.62	Penalties	$25,113.43
1920		64,053.64		24,340.38
1921		67,751.68		17,615.44
1922		61,341.68		4,907.33

September 15, 1925, plaintiff filed a written demand with the County Auditor and Board of Supervisors for the return of taxes "illegally and erroneously" exacted from plaintiff for the years 1919, 1920, 1921, 1922. No refund has been made or ordered and no action on the demand taken.

Plaintiff is without speedy and adequate remedy at law

and without mandamus plaintiff will sustain great irreparable injury.

WHEREFORE, plaintiff prays "for itself and in behalf of its stockholders" a writ of mandamus ordering defendants to refund the plaintiff the following sums for taxes, interest and penalties illegally and erroneously exacted of the plaintiff:

For 1919—Penalties and interest	$25,113.43
1919—Taxes	43,457.66
1920—Penalties and interest	24,340.38
1920—Taxes	52,224.54
1921—Penalties and interest	17,615.44
1921—Taxes	56,397.69
1922—Penalties and interest	4,907.33
1922—Taxes	51,449.39
	$275,505.86

and prays costs and general equitable relief. (R. 17.)

To this petition, the defendant-respondents filed their

ANSWER

setting forth the issues, summarized, as follows:

1. General denial except as to specific admissions.
2. Admission of official capacity of defendants and corporate capacity of plaintiff.
3. Admission of levy on plaintiff's property substantially as alleged.
4. That monies paid each year have been distributed to various political subdivisions;
5. That no part of the money is under defendants' control or custody.
6. That defendants have no money under their control or custody out of which to refund, if court would so decree.
7. Statute of Limitations:

8. Laches under allegations of plaintiff's petition and in fact;

9. Estoppel by reason of laches;

10. That plaintiffs have plain, speedy, adequate remedy at law;

11. That plaintiffs' remedy, if any, is appeal to courts from Board of Review;

12. That plaintiffs are not entitled to mandamus under allegations nor under true facts;

13. That failure to deduct U. S. bonds and savings stamps from assessment, was strictly in accordance with law;

14. That any error or intentional illegality on the part of taxing officers cannot be corrected in this proceeding;

15. That plaintiffs, seeking equitable relief, must do equity, and the plaintiffs have during all the years complained of habitually, intentionally, systematically and generally aided and abetted and encouraged its customers to evade taxation and conceal property from taxation, and such an amount is far in excess of amount sought to be recovered from defendants;

16. That plaintiffs are not real party in interest, because taxes in reality paid by and charged to stockholders, and stockholders alone, if any, have right to seek recovery;

17. That plaintiffs were not assessed but the several stockholders were assessed;

18. That there is a defect of parties plaintiffs in that stockholders assessed are not parties nor seeking recovery.

19. That plaintiffs have not been discriminated against by method provided by Statutes of Iowa nor by method under which plaintiff's stockholders were assessed.

20. That an assessment of five mills on all the monies and credits held and owned by the plaintiffs would exceed taxes assessed and plaintiffs are not damaged.

21. That stockholders assessed are also persons complained of as competitors of themselves, and they have acquiesced in the assessments under the two plans, and cannot be heard to complain.

22. That the Board of Supervisors have acted upon the petition of plaintiffs asking this same refund, and refused the refund, and such action is a judicial deter-

mination from which only an appeal or certiorari will lie and mandamus is not tenable;

23. That the plaintiffs were guilty of laches and have waived and are estopped to complain in that they

a. With knowledge in 1919 and 1920 of basis of objections and that monies collected would be distributed, plaintiffs signed and approved assessment rolls;

b. Made no objections except in appeals from Board of Review, in each instance decided against plaintiffs;

c. Made no complaints to taxing authorities;

d. Made no complaint to County Auditor;

e. Never called attention of County Auditor or County Treasurer or any taxing officials, names of individuals or corporations erroneously assessed;

f. Took no appeal from Board of Review in assessments of others in alleged competition with plaintiff;

g. Permitted Municipal corporations to make expenditures and incur indebtedness relying upon the collection of taxes;

h. Waited until taxes were expended and distributed, as to be impossible of recovery by taxing bodies;

i. Permitted funds to be expended for current expense and maintenance and not in interest producing investments, and plaintiff seeks not only return of principal but interest.

24. Plaintiffs are not authorized by stockholders by and for whom taxes were paid to bring these suits.

25. The stockholders at time of commencing of suit are not same stockholders who and for whom taxes were paid, and there is no authority express or implied to represent those who were before but not stockholders at time of commencement of suit.

26. The plaintiff in 1922 or 1923 brought suit in the District Court of the United States, Southern District of Iowa, in injunction on similar or same allegations, and said cause was adjudicated adversely to plaintiff. If not adjudication, payment of taxes after dismissal, was laches.

27. By stipulation the adverse holding in Des Moines National Bank v. Fairweather was an adjudication of plaintiffs' claims in this matter.

28. That the decree, in the cause of action brought by Des Moines National Bank v. Bennett, et al., referred to in Count II of plaintiff's petition, does not constitute an adjudication in that,

a. The plaintiffs are not privy to said action.
b. There is not the same evidence.
c. The issues were not identical.

(R. 31-52.)

This cause was called for

TRIAL BEFORE POLK COUNTY DISTRICT COURT OF IOWA, IN EQUITY,

November 7, 1927, and a long trial was had, in which 5078 pages of oral testimony was given and 1817 exhibits were offered. There was then, as is now evident, a disagreement as to what the important issues were, and as will appear there is a dispute now as to the facts as proven and disclosed. This prevents our making a bare statement of facts, but within justifiable practical limits we submit our

CONCISE STATEMENT OF FACTS

as being in accordance with the rules of this court.

Down to and through the paragraph on page 10 of Brief of Petitioner referring to the case of Des Moines National Bank v. Fairweather, we find no inaccuracies as to fact statements relating to the cause, but at that point on, inferences and statements are made which we believe are expressions of contention rather than fact, so we state the facts as we believe them established by the testimony, avoiding contentions as best we can.

On November 28, 1923, the petitioner made a tender in

the form of Exhibit 1771—(Record 880), declined "because the amount offered was not the amount shown by the tax lists of the county as against the amount to be collected". (Record 596). There is no testimony of any demand with threats unless attached to Exhibit 1766 and it is not in this record.

(See record 585 and 875).

AS TO WHETHER THERE WAS COMPETITIVE MONEYED CAPITAL.

At the outset we correct the inference or assumption of plaintiff where it says on page 13 of its Brief:

> "Since it is conceded by the majority opinion of the Iowa Supreme Court that the shares of these corporations constituted a relatively material amount of moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States, we shall not burden * * * etc."

This is not correct. The Supreme Court of Iowa in its opinion says:

> "During these years a large number of domestic corporations employing, *as we shall assume*, moneyed capital in competition with plaintiff in Des Moines in like form made to the assessors their sworn statements." (Record 1901).

This is, we believe and assert, only an assumption for sake of argument and is not "conceded by the majority opinion."

We do not reiterate all the statements made in plaintiff-petitioners' brief as much of it is unavoidable in the argument.

By failure of categorical denial we do not wish to be held to have accepted petitioner's statements as accurate.

In the brief petitioner states: Page 16:

"Substantially all phases of the loan and investment business were carried on in the City of Des Moines during the four years in question by these corporations."

This statement we believe to be one of contention and the facts established show the business as carried on in the banks was not the loan business as carried on by these corporations but was distinctly different and the corporation business instead of being competitive was the doing of that which the banks could not do and enhanced the bank business instead of competing with it.

The same is true of "certain foreign corporations" discussed under petitioner's classification "B" and is true of the individuals. Instead of being "competitors" they were all "customers" of the plaintiff or other banks taxed as plaintiff was, and their very business made them customers.

Since plaintiff-petitioner, by virtue of its assumption that the matter is determined, has not stated the record facts in its statement of the case, we feel compelled so to do and submit a statement of facts as to the

"ALLEGED COMPETING CORPORATIONS".

References are made to the printed Record in this court thus (R. .....). However, there was certified to the Supreme Court of Iowa, by the Clerk of the District Court of Polk County, the "Transcript of testimony", being 5079 typewritten pages. Reference is therefore made also to the Transcript page thus (Tr. 1-100), and are the same references as made in the record certified to this court by the Clerk of the Supreme Court of Iowa, pages 1638 to 1666 inclusive, and the recital of facts there stood unchallenged, pages 1805-1891.

SECURITY LOAN & INVESTMENT CO.
(Tr. 299-336)

This company was affiliated with the Security Trust & Savings Bank "and any really banking business * * * was done with the bank and not with the Security Loan & Investment Company." (R. 204.) The largest simgle customer of the "company" was the Penn-Mutual Life Insurance Company, handling probably one-fourth of all the company's loans. (R. 204.) The Security Loan & Investment Company operated on money borrowed from the plaintiff banks and the Des Moines National (R. 204.) Most of the business was done on borrowed capital received from the banks, on a transfer of the loans to the bank upon a resale agreement and the banks never once complained of any "competing or interfering" with the plaintiffs (R. 205.) Most of the loans held by the company were up as security with the banks from whom money was borrowed (R. 205.) During the four years the company had second mortgages and when it sold them, it usually guaranteed them. (R. 206.) The Cmpany also as a habit made loans in excess of fifty per cent of the value. One mortgage would be for the fifty per cent amount (R. 206) and a second mortgage for the balance. These excesses amounted to $350,000 of the assets. Sometimes the notes of the loan were in excess of 50% of the value of the security and the last notes were guaranteed by the company. (R. 1102 Den. 6.)

It loaned money on buildings in process of construc and advanced moneys to cover costs as construction gressed. (R. 209.)

Practically, all real estate loans were for five years. (R. 207.)

The company had in 1919 $84,619.00 total capital and surplus (R. 1102.) Cash on hand was $59,000.00 and Liberty Bonds $19,100.00. All the balance of $617,234.00, except $5,-

500,00 was borrowed capital, borrowed from the banks on which interest was paid to the banks. (R. 1103, Den. 8.) In 1920, 1921 and 1922 the same situation was true as of 1919. The company did business as a Trust Company because it could do more business on a small capital than a bank could. The company financed the promotion of subdivisions of land (R. 210.) The financing of buildings were of the type of loans that banks would not make. (R. 210.)

IOWA INVESTMENT & MORTGAGE CO.
(Tr. 378-396.)

The president testified the business of this company was "making real estate first mortgage loans" in Des Moines. The company was loan correspondent of the "Prudential Insurance Company of Newark, New Jersey" (R. 218.) The loans were "made for the Prudential" on improved real estate in each instance. (R. 218.) There was no fixed rule of percentage of value of real estate as to loan. The monthly payment plan would be a loan of larger amount than a direct loan without monthly payments. Direct loans were tried to be kept down to forty per cent of valuation according to Prudential appraisers. *"We did not make the loans ourselves, but they were Prudential loans made on their mortgage blanks and their notes. We simply handled them as their correspondent."* (R. 219.)

The bulk of the business was for the Prudential (R. 219) and the Iowa Investment did not invest its funds in these loans. (R. 219.)

The Iowa Investment & Mortgage Company made other loans. Very few farm loans, mostly city property. A few were second mortgage loans. Second mortgages were not taken as a practice but for a commission on the first mortgage. The Iowa Investment & Mortgage loans were for five years. The loans were made to sell at a profit. The pro-

ceeds could not be kept track of because the company always owed the banks money. The loans were sold in Iowa and foreign states. (R. 220.) No record of the volume of business done was kept. (R. 220.)

The Iowa Investment did not deal in short time paper, except where a loan was sold and a balance of purchase price was evidenced by the note. (R. 219.) Some of the Prudential loans were for 142 months. Monthly payment mortgages were loans up to sixty per cent of the valuation. The Iowa Investment merely acted as fiscal agent of the Prudential. (R. 219.) If the money was advanced before approval by the Prudential, the money was borrowed from the Peoples Savings Bank and interest paid to the bank. (R. 223.) The company handled no funds other than Prudential and not its own capital (R. 223.) In some instances a mortgage second to Prudential would be made in order to reach the amount the borrower had to have. (R. 93.)

CENTRAL IOWA JOINT STOCK LAND BANK.

(Tr. 377-414.)

This company was chartered by a special act of Congress, The Federal Farm Loan Act, for the purpose of making farm loans under the supervision of the Farm Loan Board, having bonds issued against these farm mortgages which were placed in the hands of the government trustee and selling the bond. They made first mortgages only in Iowa and Southern Minnesota. The loans were supervised in every detail.

The mortgages were deposited with the government registrar, and, if approved, the government issued bonds to the registrar and he signed the bonds and the bonds were given to the Land Bank for sale. They were sold in Chicago and New York, in bulk to bond houses. The president could not tell how many of these bonds were out in 1919 to January, 1922.

The item $771,200.00 bills receivable on Exhibit "1406" tax return for 1919 was probably mortgages made and on hand and not yet transferred to the Registrar, but of this the president was not sure. The company held U. S. Liberty bonds $254,248.00. He could not explain and did not know what was the item $1,350,235.00 on Exhibit "1407".

The loans were all for 33 years amortized (R. 224.) No other organizations made this kind of loan except Joint Stock Land Banks (R. 224.) Money to carry on the business was borrowed from the Peoples Savings Bank and Central State Bank and the company paid interest on the loans (R. 224) and carried deposits in those banks. The president was a stockholder in both the Peoples Savings Bank and Central State Bank (R. 225.)

DES MOINES MORRIS PLAN COMPANY.
(Tr. 507-540.)

Charles H. Bryant, the president, testified, the company was in 1919, 1920, 1921 and 1922 engaged in the business of loaning money evidenced "in a form peculiar to our business." Loans were made to the borrower who must have two additional joint makers. (R. 248.) During the period automobiles were financed by purchasing trade acceptances, with conditional bill of sale covering the automobile, from numerous dealers in Des Moines and adjacent towns. The trade acceptances were negotiable instruments secured by endorsement of the dealer due in installments provided for in the body of the instrument. (R. 249.)

The automobile paper drew no interest except after maturity. They were bought at eight per cent discount. There was similar financing of washing machines and other household appliances; handled the same as the automobile paper. (R. 250.)

Investment certificates were issued by the bank or a cer-

tificate of indebtedness with interest, perpetual in form, callable on 30 days by the investor or bank.

In four years, about $2,500,000 of automobile paper was used and about $100,000.00 household appliance in one year. All paper sold was confined to trade acceptances. The bank never discounted its own notes.

The Morris Plan Bank was organized to defeat the loan shark. The bank dealt with the class of people not having credit at a bank and could not obtain credit at a regular banking institution. (R. 254.)

Certificates were issued by the Auditor of State entitling the bank to a qualification for tax purposes under the acts of the 38th G. A.

Loans made by the bank are not desirable loans in the general banking business. Twenty per cent of the business is referred by the local banks. (R. 256.) No checking accounts are carried in the bank.

CONTINENTAL SECURITIES COMPANY.
(Tr. 543-563.)

Marion D. Woods, who was secretary of the company, testified:

The company was engaged in "largely" first real estate mortgage business. The real estate was in Iowa usually close to Des Moines. The loans were made according to a schedule which the company "tried to follow" being between forty and fifty per cent of the value. Some construction loans for the financing of building homes were made, but not many. (R. 257.)

The loans were sold to investors largely locally, but a great many were sent to different parts of the country. Purchase moneys received were reloaned. The certificates were purchased only to protect mortgages held. Most of this was in Oklahoma. Some local improvement bonds were handled,

and "some, not a great deal" financing was done of public improvement contractors. The arrangements were the company bought the bonds, agreeing to pay as the work advanced, and when the job was finally completed, the bonds were turned over in settlement. (R. 258.) The contract was not assigned and only in one instance did they take personal guarantee.

Advances only amounted to $80,000.00. Bonds were purchased below par. (R. 258.)

Debenture bonds were issued secured by mortgages held by the company. The company did in 1912 to 1922 $150,000.00 to $200,000.00 per year. The total highest amount of debenture bonds was "not in excess of $50,000.00" and in 1919 $10,000.00 (R. 259.) A few second mortgages were handled. No deposits were accepted and there was no discounting or rediscounting of short time commercial paper. (R. 130.)

IOWA GUARANTEE MORTGAGE CORPORATION.
(Tr. 56[illegible]587.)

J. D. Adelman, the president since 1920 and prior thereto secretary, testified the company is organized under the laws of South Dakota, with its principal, operating place of business in Des Moines and its principal office in Pierre, South Dakota. (R. 261.) The general business was discounting conditional sale contracts covering the sale of automobiles on the deferred payment plan. In 1919 and 1920, some business was done by an automobile distributor selling cars to the Mortgage corporation, who in turn placed the car on the dealer's floor upon a trust receipt. (R. 261.) After 1920 the earnings were by way of discount on sales contracts of automobiles sold by the dealer to individuals (R. 261.)

The notes on Exhibit "103" may be either stock notes or dealers notes (R. 1109.)

The notes in Exhibit "583" for 1920 were $347,000.00 money borrowed from the banks and "other notes" $163,223.00 were stockholders notes. Exhibit "620" notes for 1921 $321,-339.00 were automobile notes acquired by discounting installment sale contracts. (R. 262.) The same is true of items $142,000.00 on Exhibit "1477" for year 1921. This business was done in Iowa. The notes and contracts were trusteed with the plaintiff, Des Moines Savings Bank and Trust Company for the purpose of issuing collateral gold notes or bonds. The bank was paid for this service (R. 262). The bonds were sold to banks in Iowa and Illinois. None sold to individuals. These sales furnished turnover of capital.

Automobile paper handled in 1921 was $411,751, 1922 $606,999, 1919 $1,013,740, and 1920 $1,179,032.

Automobile contracts were where title remained in the dealer and the buyer bought on installments over a 12 months' period. The discount was nine per cent. They were always purchased at the beginning of the deal. No banks, so far as known, were doing that business. The contracts were not endorsed by the dealer and the mortgage corporation took its own chances. The only security was the ownership of the cars.

The other method of financing during 1919 and 1920 was the cars would be sold by the distributor to the Mortgage Corporation. The Corporation would place the car on the dealer's floor, take a trust receipt, and an acceptance signed by the distributor and accepted by the dealer payable on a certain date. The distributor is the wholesaler. The distributor was paid and made a bill of sale to the mortgage corporation. The corporation in delivering to the dealer took a trust receipt and retained ownership of the car. (R. 264 & 1108.) If the dealer sold on contract, the corporation took the contract in payment of the acceptance (R. 264.) The corporation borrowed money during these years from the Iowa National Bank, Iowa Loan & Trust Company, Valley

National Bank and Mechanics Savings Bank. None of the banks complained that the corporation was in competition. (R. 265.)

FEDERAL CATTLE LOAN SOCIETY.
(Tr. 657-683.)

This was a South Dakota corporation, engaged in loaning money on cattle in 1919 and 1920. The loans were evidenced by notes and chattel mortgages on the cattle. Customers were sent through the country banks. Applications were left with the country banks. Loans would be for six months, sometimes shorter. 1920 assessment roll, Exhibit "584", shows $144,241 of notes or cattle loans. The cattle were "feeder" cattle. The 1921 assessment roll, Exhibit "1480" shows notes and mortgages $50,000 all Chattel Cattle loans. (R. 275.) The other item, $267,453.31; is stock notes given for corporation stock.

The cattle loans were sold to the banks to turn the capital. None of the loans were made through Des Moines banks (R. 275.) No bank objected to the business but were assisting in securing the loans. Only loans were accepted in excess of what the bank could loan legally. Interest rate was higher. (R. 276.) No loan was taken that the bank could handle and loans were sold in Chicago. They were offered to the Iowa National Bank and Valley National Bank who declined them (R. 277).

The cash assets were on deposit in the Iowa National and Valley National Banks. These two banks declined the loans because the banks did not consider them safe (R. 278.)

No business was done in 1919. The company only actually operated in 1920 (R. 278.) There were no correspondent banks in Polk County (R. 280.) Endorsements of the paper by the company were unqualified (R. 280).

GARNER INVESTMENT COMPANY.
(Tr. 614-639.)

H. W. Garner testified this is a corporation organized some time in 1919 and during the years of 1919, 1920, 1921 and 1922 was in the Valley National Bank Building. The organization's capital was $50,000.00 paid in 1919. The business was that of the purchase or investment or re-sale of notes, mortgages, bonds and at the suggestion of plaintiff's counsel, stated: "They also dealt in negotiable securities that are generally dealt in the business world". The company chiefly dealt in notes and certificates of deposits of banks. The banks in which certificates of deposit were discounted or purchased were Des Moines institutions and were purchased from the people in the vicinity of Des Moines. They were certificates of deposits in the Central Trust Company and they were purchased outright. There was no security other than the certificate itself. The notes purchased were signed by individuals arising in certain business connections and offered to the company for sale. They were all located in Iowa. The majority of them originated around and near Des Moines. They were for sixty and ninety days and for three months, six months and one year. They bought them at a discount and made some investigation as to the solvency and financial responsibility of the makers of the notes. They were endorsed by the party from whom they made the purchase. The company made sales of the certificates of deposit and of the notes, all in Iowa to banks or other investors.

The company did no advertising but received its business by personal solicitation. The company handled bonds and the purchase of blocks of bonds from the dealer, usually by means of borrowed money from the banks together with company funds and then re-sold the bonds to individual investors located in this vicinity. The company made no mortgage loans direct but purchased for investment and held cer-

tain mortgages but no appreciable amount was held in 1921 or 1922. In those two years the general nature of the business was selling bonds.

The entire note business in 1919 and 1920 would amount to $150,000.00. The mortgages were less and very few were sold. The bond business in 1921 and 1922 was probably $200,000,00. No municipal or government securities were handled. No collateral bonds or debentures were issued. The notes were bought at a discount and the company did not run a bank and the paper did not have to have a bankable character, and the notes were bought without recourse and there is no uniformity in the form of the notes. Money was borrowed from local banks and securities purchased were deposited as collateral for the money borrowed. They often had possession of the collateral merely for the purpose of sale. The bank loaned the money for the specific purchase of the bond and for the purpose of making the transaction possible. The bank at no time complained that the company was competing with their business and "I did not believe we were".

The mortgages purchased were usually over three years and the majority of them were Minnesota mortgages. The bonds purchased were industrial bonds entirely. (R. 266-272.)

JESSE F. STEVENSON & COMPANY.
(Tr. 718-734.)

The president of the corporation testified the company were dealers in investment securities, making farm loans on Iowa properties, loans on business and residence properties in the City of Des Moines, also handled and dealt in strictly municipal bonds in connection with city improvements, paving, sewer, etc. The mortgages were sold as quickly as could be done but some were kept longer than was anticipated.

Most of the mortgage loan business was done on the company's own paper, payable to itself. The mortgages were sold to individuals and to insurance companies. The only company for which it solicited business in the way of mortgage loans was the Connecticut Mutual Life Insurance Company. In those cases the forms of the insurance company were used.

The exclusive territory was Polk County but a few loans were made in other counties with co-operation of solicitors in those counties and they were all in close proximity to Polk County. Most loans were made on residence property other than in the City of Des Moines, and on no business property other than in the City of Des Moines.

The company sold and bought the entire issue of public improvement bonds but they were handled largely to supply the demand of individuals that wished that class of security. Most improvement bonds were obtained by the company entering into a contract with the contractor who had the special job agreeing to purchase the securities to be issued at a certain discount. Some time money was advanced on the contract, usually in the larger transactions. When the securities were ready for delivery there was an accounting made and the balance was paid. An assignment of the contract or the proceeds of the contract would be taken. The dealings were entirely with the contractor. There were some occasional transactions with municipalities but very few. Contracts were bought or financed in Newton, Creston, Hedrick and Malvern, Iowa. When money was advanced, a note was taken for it and interest charged. The bonds so purchased were sold by the company to its regular clients. Some United States Liberty Bonds were held but it was a mere matter of accommodation to the people that would come in that bought them. When received, they were usually shipped within a day or two to a Chicago house.

There may have been one or two drainage contractors financed but not to any extent.

In the loans made for the Connecticut Mutual Life Insurance Company, the commission was always paid by the borrower. These loans were exclusively farm lands. A few large loans were made on business properties and while they may not have been made direct to the company, they were at once turned over to the insurance companies but really sold in advance. (R. 286.)

Sometimes farm loans were split into first and second mortgages. In addition to special improvement bonds, some general and direct obligations for municipalities, school districts, etc., were handled. Money during this period was borrowed from the Valley National Bank, Commercial Savings and the Mechanics, and the Bankers Trust and Central State Bank, and this was especially heavy in 1920.

At the time the money was borrowed, the matter was discussed with the officers of the bank as to the purposes and the mortgages or certificates purchased by the proceeds or other securities would be put up as collateral.

There was never any suggestion of an objection on the part of the Valley National Bank or any of the banks, and as a matter of fact they were glad to get the paper. The company gave a note for the money borrowed. In fact, the banks requested some of the company paper and the company was unable to meet the demand. Short time paper was not a part of the business of the company. No deposits or checking accounts were accepted. (R. 285-291.)

FARMERS BOND & MORTGAGE COMPANY.
(Tr. 738.)

The president of this company testified the company was organized in 1920 and the company has been engaged in the business of negotiating first mortgage loans on Iowa land

and on some city property. As a rule, there were no loans on other city property than in Des Moines, possibly once at Maxwell. Loans were made in Polk, Story, Jasper, Madison, Greene, Warren, Union, Clark, Boone and several other counties.

When the loans were made, the company negotiated them and sold them to insurance companies mostly. Few mortgages were sold to private investors. The first mortgage certificates were issued by mortgages being deposited with the Bankers Trust Company and trustee and the certificates issued against the mortgages and countersigned by the trustee. Interest was paid on the certificates. The certificates were collateral by either side prior to any interest date. They were first issued in the latter part of 1920 at the highest amount outstanding of $140,000.00. Most of the loans were five year loans. Occasionally a seven year loan and an amortized loan, a thirty-three year loan for an eastern insurance company were made.

The company borrowed money from the Bankers Trust Company, the Iowa Loan & Trust Company Bank and also from the Valley National Bank, who knew of the transactions and the purposes of the borrowing of the money to make loans and no objections were at any time made by the banks.

The company did not receive deposits or any checking accounts or issue drafts or other evidence of exchange and no savings accounts. (R. 292-298.)

MOTOR FINANCE CO.
(Tr. 790-799.)

This was a partnership composed of M. W. Engleman and Joe Gottstein, operating during the years of 1921 and 1922. The business consisted in buying automobile contracts from dealers, the contracts representing the balance of the pur-

chase price and in a few instances they made direct loans on automobiles to owners of cars.

The indebtedness was evidenced by a note and a chattel mortgage upon the car. Loans were obtained by personal solicitation among the local car dealers and by advertising through the mails.

The first year all of the business was done in Des Moines and later out of the State and in one or two instances outside of the State, some in Minnesota. Business was done in Ames, Nevada, Hampton, Iowa Falls and Mason City.

The company held the notes themselves and purchased them by discounting. The earnings were of the original discount and the interest on the notes.

In addition to the personal funds of the partners, money was borrowed from the banks. Notes made and purchased were kept until maturity.

The company did not receive deposits or honor checks or drafts. In 1921 and 1922 about $100,000.00 business was done. (R. 298-30.)

UNION MORTGAGE & CATTLE LOAN COMPANY.
(Tr. 800-810.)

The secretary, who first became connected with the company in March, 1921, testified that the company was organized in May, 1919. A large part of the business was second mortgages on Iowa farm land. A few first mortgages were taken and quite a few chattel mortgages on cattle. The mortgage loan business was a great part of the business and second mortgages far exceeded the first mortgages. The land upon which loans were made was located exclusively in Iowa—pretty well scattered throughout the State.

Indebtedness was evidenced by a note and mortgage securing it. There was an application for the loan and an appraisal was had. The corporation became defunct.

Cattle loan business was started in the fall of 1919.

Indebtedness was evidenced by notes and chattel mortgages, being first liens on the cattle. The cattle were ordinary feeding stock and the loans ran from sixty days to six months.

Loans were made to farms anywhere in Iowa. The mortgages were made for the purpose of permitting the borrower to purchase cattle and were made for the purpose of giving him time to prepare them for market, with the understanding that the cattle would be marketed and the notes liquidated from the proceeds of the sale.

Loans varied. The largest one was $25,000.00 and the smallest one about $1,000.00. The average was about $2,000.00. The amount of business was probably $100,000.00.

The company was flooded with applications. Circulars were sent out and the company was advertised through salesmen. There were some stock salesmen. (R. 300-301 and 317-328.)

BOND & MORTGAGE COMPANY OF IOWA.
(Tr. 811-841.)

This company was a corporation and the auditor testified that it was incorporated in 1918 and the business was investments, buying and selling bonds and mortgages, notes and securities of different kinds, and in making of mortgage loans on real estate, both farm and city. The properties were confined mostly to Des Moines and some nearby territory. Some loans were made in Newton and Indianola. The bulk of the loans were sold to insurance companies. All loans were sold to eastern companies, particularly the Metropolitan Life Insurance Company of New York and the Western & Southern Life Insurance Company of Cincinnati, Ohio.

The loans were made to the Bond & Mortgage Company

and then assigned to the Metropolitan Life Insurance Company.

In the years 1919, 1920 and 1921 the volume of the business done was probably $400,000.00.

The company handled bonds of various types, government, municipal bonds and very few industrial. Municipal bonds were special assessment bonds and some school bonds. They were purchased from the contractors. In other words, the contractor was provided with the funds to proceed with the work and upon the completion of the work, the bonds were turned over.

The bonds were purchased at a discount and were then sold to clients and investors who lived at varions points throughout the State and one in Nebraska who took a number of them. Bonds were sold mostly in small lots. Investors were clients, stockholders and others obtained through advertising. Some automobile notes were handled. These were given as part of the purchase price on automobiles, secured by a conditional bill of sale. They were bought from the dealer at a discount and then collected usually in monthly payments. These were local dealers. About $50,000.00 in that type of paper was kept working.

The volume of business so handled was probably $100,000.00.

A large volume of farmers notes were purchased. These were unsecured notes made by individuals purchased through one source. They were discounted and endorsed by the party from whom bought. He resided at Newton. The purchase of these notes amounted to $800,000.00 or $900,000.00. Farm loans were made in Missouri—none in Iowa.

The total capital issued in 1919 was $37,770.00. The amount of bonds handled would probably total $1,000,000—that is, the total turnover. Almost all the loans made and sold to the insurance company were fifteen year terms and were usually submitted to them before closed and the insur-

ance company had its appraisers and the corporation its appraisers. The notes purchased were from Mr. Gifford at Newton, who was promoting a manufacturing concern. They were given for merchandise to be delivered at a future time, supposed to be stock food. The notes were sued upon on the basis that the company was an innocent holder for value and in every case tried the jury or the Court held otherwise. Gifford went into bankruptcy and a large number of the makers of the notes and those sued upon were held not to be the owner for value in due course before maturity.

The automobile notes purchased usually spread over a period from six to ten months, during the time the company borrowed money from the Valley National Bank and put up collateral for the loan and told the bank why they were borrowing and the bank did not complain and the bank, knowingly, for the purpose of increasing the corporation's business, permitted the corporation to borrow without any complaint and wished the corporation success. (R. 301-307.)

MANNING MARTIN COMPANY.
(Tr. 842-854.)

The president of this corporation testified that in 1919 to 1922 the company loaned money on Des Moines real estate. Some loans were made in Fort Dodge. They were purely first mortgage loans. Some respect was paid to the appraised value of the property and some depending to some extent on the moral risk. There was no rule with respect to the value of the property except on the judgment of the officers of the company and appraisement and investigation was made as to the responsibility of the borrower.

No mortgages were bought from individuals. Loans were made to individuals, banks and life insurance companies. Some were sold in Chicago, a majority of them in Des

Moines. Ninety per cent of the loans were on residential property.

The total business on five years was one million and a quarter to one million and a half. Money was borrowed to run the business from the Valley National Bank and the Peoples Savings Bank. At times the company owed the banks $30,000.00 to $50,000.00.

Stockholders of the company were C. H. Rosenbaum of the Bankers Life and Mr. E. H. Slininger of the Peoples Savings Bank, W. B. Brown, attorney, and Charles Martin of the Peoples Savings Bank. Some of the loans were sold to the Peoples Savings Bank. Some loans were temporarily taken off the company's hands by the Iowa National Bank. They knew what the company was borrowing money for and were glad that the company was making city loans and wanted the money to finance it and there was no objection nor any suggestion that the company was interfering with or in competition with the bank's business and never refused to loan money on that account.

No savings deposits or checking accounts were carried by the company. Some loaning to contractors to enable them to build houses was done, but it was a very hazardous business. (R. 307-309.)

DES MOINES JOINT STOCK LAND BANK.

(Tr. 873-881.)

The president testified that the company's office was in Des Moines. Its business was making farm loans on mortgages on "the amortization plan as authorized by the act of Congress known as the Federal Farm Loan Act," in Iowa and Minnesota. Loans were only permitted on lands for agricultural purposes, not to exceed fifty per cent of appraised value of security, to be determined by Federal appraiser. Between 70 and 80 per cent of the loans were in

Iowa and 30 per cent in Minnesota. Bonds were issued by the government in lieu of mortgages deposited with the registrar. In four years about $1,600,000 were issued. The bonds were sold to a syndicate and the bank had the funds for reinvestment. Interest was due semi-annually and the loan matures and liquidates in thirty-three years by payment of semi-annual installments.

No mortgages were sold on the open market. No banks in Des Moines were making this type of loan. (R. 312-317.)

FIRST AND SECOND MORTGAGE CORPORATION.
(Tr. 882-896 and 906-914.)

The secretary testified this corporation had the same officers and stockholders as the Des Moines Joint Stock Land Bank though not entirely identical. It was in the brokerage business, bought and sold farm loans, developed city additions and dealt in city property and represented eastern banking houses in the purchase of school bond issues.

The company's stockholders were many country banking institutions through their officers and applications for farm loans were solicited through these banks, which applications were submitted to the Des Moines, Lincoln and Chicago Joint Stock Land Banks, Central Life Insurance Company and Illinois Merchants Trust Company, taking care of all the details as to the execution of the papers and title to the mortgaged land.

In the insurance loans the borrower paid a commission and in the land bank loans the bank paid the commission. The loans were first mortgages. The insurance loans were five, seven and ten year notes.

The company bought a Le Mars Gravel Company bond issue for investment but gave company stock for them. No investment certificates were issued. The company held many stock notes. It did not loan its own money.

All second mortgages were in settlement of purchase of stock in the company. (R. 312-317.)

CONTINENTAL MORTGAGE AND LOAN CO.
(Tr. 1022-1052.)

The secretary of the corporation testified that it was organized in 1919 and did business in the years 1920, 1921 and 1922. Its business was principally automobile financing and some other investments were bought.

The automobile financing was where the dealer sold an automobile, new or second hand, with an unpaid balance of the purchase price, which balance was evidenced by a note and mortgage on the car, six or twelve month's paper. These were purchased by the corporation at a discount. The note bore interest after maturity. The company borrowed money from banks by depositing the collateral as security. Some collateral trust notes were issued also. Possibly a gross of $100,000 business in one year was done. The company would buy any paper it thought sound and profitable but the major business was automobile financing. Only one or two real estate loans were made, except where arrangement for the sale was made before the deal was closed. No Des Moines bank, so far as known, was loaning on any second hand automobiles. (R. 336-340.)

DES MOINES DISCOUNT COMPANY.
(Tr. 1053-1062.)

The secretary-treasurer of this company testified as to the years 1921 and 1922. The company bought notes and in two or three instances bought automobile contracts or loaned money for the purposes of buying automobiles. The notes were all held until maturity. They averaged a year as to maturity. Money was borrowed of the local banks, and no

complaint was ever made that they were in competition. Collateral was always taken for loans. The company handled a class of business the banks would not handle, (R. 342) and the security was of a different type (R. 341-342).

BANKERS MORTGAGE COMPANY.
(Tr. 1063-1086.)

The vice-president and sales manager testified he was with the corporation from July, 1918, to January, 1920. The company dealt largely in farm mortgages, municipal bonds, corporation bonds, industrial and public utility bonds and a few city mortgages, but not many, almost wholly in Iowa. Customers or prospects were produced by the stockholders and bankers.

Loans were first mortgage real estate loans.

Municipal, county and school bond issues were bought. These were resold to any buyer found.

In 1919 all the business done was approximately $1,000,000.

Liberty bonds were bought and sold, as well as railroad bonds and a few foreign bonds. Debenture bonds were issued. These were secured by mortgages deposited with a trustee. No special assessment bonds were dealt in. The witness was not listed as a stockholder of the company in 1918 or 1919 though he claims to be vice-president.

The company got the loans the bank did not want to make. (R. 343-347.)

UNITED MORTGAGE LOAN COMPANY.
(Tr. 1099-1103.)

The president testified this company is a corporation. It made real estate loans, bought contracts. The loans were on Des Moines real estate, first or second mortgages, but mostly

second mortgages. They were generally one year or more. Real estate contracts were also taken as security as collateral to loans. The items $5,979.17 in Assessment Roll of January 1, 1919, Exhibit "1394", were first and second mortgages, the same as to item $5,699 January 1, 1920, Exhibit "1395", $4,544.00, January 1, 1921, Exhibit "1396", and $3,700.50 January 1, 1922, Exhibit "1397".

Some loans were sold to individuals and when sold the money was used to pay debts or buy other securities. The company catered to the risky business with stiffer loans and more profit. (R. 349-353.)

MERCHANTS LOAN & INVESTMENT COMPANY.
(Tr. 1103-1128.)

The vice-president testified the company bought contracts and loaned money on real estate security occasionally on other collateral, but not as a rule. It was a first and second loan business but considerable of a second loan business. Some loans were sold to individual investors in Des Moines. A very limited amount of loans were made on collateral as liberty bonds or stock. Most real estate loans were on Des Moines property while some were on farms in Dallas and Polk Counties. The company turnover during the years was from 50 to 100 thousand dollars.

The business consisted in the making the loans and either holding them for payment or reinvesting of the proceeds. The company is now liquidated.

The real estate contracts bought were where real estate had been sold on a small payment down and the balance to be paid in installments. There was usually a first mortgage on the property creating a liability of "Bills Payable". Contracts were purchased at a substantial discount and ran a number of years. Stockholders in the Central State Bank, Mechanics Savings Bank, Des Moines National Bank, Central

Trust Company, Valley National Bank and Peoples Savings Bank were stockholders in the company.

It was organized in 1920. The loans were mostly second mortgages and the first mortgages were "stiff" and over fifty per cent of value. The company catered to the business that took more risk and more profit. No deposits were received. Its deposit account was kept in the Central State Bank. Money was borrowed from the Central Trust Company or Central State Bank on collateral. (R. 350-353.)

STATE BOND COMPANY.
(Tr. 1205-1213.)

Ross, an officer (?), testified over objection how the company was doing business prior to his connection with it. He stated the company was organized to sell savings bonds in the city and state. The payments for the bonds were made monthly and the money was invested in first mortgages and deposited with the Auditor of State. The bonds were twenty year bonds with part of them having a settlement privilege after ten years, but the amount he did not know.

The Capitol Hill Bank had issued participating bonds which were taken over by the company upon organization. It was organized by the owner of the bank. What participating meant, he did not know.

The real estate loans were either made direct or purchased from the Capitol Hill Bank. (R. 366-368.)

POLK COUNTY MORTGAGE COMPANY.
(Tr. 1349-1363.)

The president of the company testified: The company confined its business to Polk County. It was in the "subdivision business" and only made loans incidentally. In rare instances was a loan made and disposed of for a com-

mission. Never was a loan bought and loans were made as a rule only incidental to the sale or subdivision of property. Loans were made to promote the sale of property and the note was usually to the company. The mortgages were usually first mortgages. The money was usually money belonging to the president's relatives. Some loans were made in connection with real estate transactions for the purpose of enabling the buyer to pay off obligations accrued against the property. They were advances. Some Liberty bonds were taken on payment of property. Real estate was the principal business, that is, buying a tract of land and then subdivide them and sell the lots, usually on monthly payment contracts. All loans made were only incidental. (R. 391-394.)

CORN BELT LAND & LOAN COMPANY.
(Tr. 1409-1417.)

A stockholder, a brother of the president, but otherwise we find nothing to call him "chief", testified, he was familiar with the business "in a general way". The company was in the general real estate loan business, buying lands, borrowing money and making loans for other people, "that is all". It was the general rule of the company to have applications made for loans and after some one has inquired for a loan, have a man or men go to various places and seek the money, and after the company "was sure" it could get the money, the transaction would be closed and the loan made. Most security was real estate, but some were chattel loans. The loans read largely to the person taking them over. Some money was received from insurance companies but the company was not the official representative. Some loans were made to the company where it borrowed the money from the insurance company. It was very seldom the company sold a loan.

The witness lived in Illinois in 1919 and 1920 and had

very little to do with the company except reports and letters were sent him. The president, since deceased, stated the company had none but purchase price mortgages in 1919 and the witness says that is correct.

The company was not in the business of buying and selling short time paper and took no deposits. (R. 400-401.)

GUARANTEE MORTGAGE & FINANCE CO.
(Tr. 3307.)

The president of the company testified, it was a corporation under the laws of Iowa, beginning business when it was incorporated in 1918, but its organization was not completed until 1919. It was an investment company and bought and sold securities and dealt in farm lands and securities. It handled both first and second mortgages. In cases, it made loans direct to the borrowers, mostly in Iowa. Most of the loans were farm loans and only one or two pieces were done on city mortgages and that was in Des Moines. The company issued debenture bonds. As an example, $120,000.00 of mortgages would be taken and deposited in trust and against them $100,000.00 of collateral or debenture bonds issued. These were an obligation of the company. They were sold in Iowa and bore interest. They ran for five years. The first issue was for $100 000.00 and $80,000.00 of them were sold. The second issue was $100,000.00 and $29,000.00 of those were sold. There were some collateral loans but as a matter of business the loans were only real estate.

The $75,000.00 item in Exhibit "1427" represents stock subscriptions, notes and mortgages. The collateral loan item of $99,000.00 in the tax report of January 1, 1920, were collateral loans made to stockholders, the collateral being the company's stock. The item $213,575.00 liabilities were mortgages on farms that the company had purchased. The item of assets $989,542.06 in the statement of 1920, is certificate

of deposit $157,903.00; liberty bonds $191,050.00; mortgage notes $533,700.00; and collateral notes $99,563.60; stocks purchased $7,325.00.

The item in January, 1921, tax statement assets $1,222,931.00. This represented liberty bonds $151,450.00; and collateral notes $299,279.00 which had been originally stock subscription notes but now were stock collateral notes and a secured note of $4,353.00 and a commisison note of $600.00.

In January, 1922, the asset item of $1,443,127.00 was made up of $1,101,936.00 mortgages, collateral notes $311,488.00, and notes receivable $24,000.00; certificate of deposit $5,000.00, and a commission note of $480.00; stocks purchased were $34,767.00 and bonds $12,360.00.

January 1, 1921, the company owed the Peoples Savings Bank, Des Moines, Iowa, $35,000.00, the Des Moines National Bank $25,000.00, and the Mechanics Savings Bank $25,000.00, and a Chicago National Bank $90,000.00. In January 1, 1922, the company owed the Peoples Savings Bank $15,000.00, Des Moines National $25,000.00, Slater Savings Bank $2,052.00, and $195,055.00 for farm mortgages, and $59,500.00 on deferred lease payments. (R. 616-619.)

NATIONAL INVESTMENT & FINANCE CO.
BURNS BROS. COMPANY.
BURNS BROS., INCORP.
(Tr. 4367-4375.)

The secretary states the Burns Bros. Company was a corporation, with its principal place of business in Des Moines. The witness first became associated with the company in September, 1921, and the witness to that time had not been interested in the Burns Bros. Company or the National Investment & Finance Company. He was elected secretary in January, 1922, and prior to that time only a stockholder. In 1921 and 1922 the company conducted an insurance depart-

ment and also had money invested in real estate mortgages and they did not handle issues of bonds or hold any. The witness thinks they dealt in mortgages and owned some farm mortgages, but they did not hold any collateral loans or mortgages upon live stock or anything of that sort.

Exhibit "1422", being the tax statement of 1922, showing the item $318,556.00 represents stock purchased in the company. The last $100,000.00 of it was for money owing on stock. The other $200,000.00 the witness does not know what it represents.

Miss Hamilton, (Tr. 1193-1204) the witness, testified that she was with the Burns Bros. Company beginning January, 1921, when it came into existence. It took over the business of the National Investment & Finance Company, the name being changed in 1921. The witness was also employed by the National Investment & Finance Company. She was a stenographer until 1921 or 1922 and then auditor for the company.

Witness stated that her memory was not clear on the business prior to the Burns Brothers Company but that she knows livestock loans were talked about and only a very, very few were made. Some mortgages were made on farm property located in Iowa. The company handled some large blocks of municipal or school district bonds. They did not handle paving bonds or street improvement bonds. They did buy and sell some mortgages but only a few were sold and many were held.

For some loans collateral such as stocks and bonds were taken.

The Burns Bros. Incorporated was not turned into the Burns Bros. Company. It remained separate and was liquidated.

Burns Bros. Company borrowed from the Des Moines National and Iowa National Banks in Des Moines. (R. 743-747.)

THE BANKING BUSINESS OF PETITIONER.

Petitioner's statement as to the Banking Business of Petitioner is fairly accurate but not complete. Without reiteration, we add:

Petitioner did not make loans direct on real estate mortgages. (R. 486.) It purchased from and held for insurance companies real estate mortgages until such time as they had funds available to repurchase them. (R. 486.) They were carried with bills receivable. (R. 486.)" A good many of these were regular mortgage loans running for a five year period, but our arrangement would be to carry them for thirty, sixty, ninety days, or six months. It was a purchase and we carried the papers endorsed and assigned to us, but with the general agreement that they (correspondent bank) were to sell them to other people". (R. 487.) It, in this manner, carried $760,000.00 of loans from the Banker's Life Company, but could not have made a direct loan that size, (R. 489) and carried loans to an excess of 25% of their capital and surplus. (R. 489.)

The bank did not buy any conditional sales contract, payable and running over a year, representing the sale of new and used automobiles. It was not the general practice to handle such paper. (R. 496.) All the automobile dealings of the Bank were with the dealers. Money was loaned the dealers on their own notes (R. 494.) The bank did not loan money to automobile companies, taking as collateral security conditional sales contracts payable in monthly or other installments. (R. 496.)

While the Bank loaned money to farmers who were cattle raisers, it did not loan money secured by direct mortgage on the cattle. (R. 501.) The Bank purchased by discounting notes secured by chattel mortgages covering cattle, but the paper was endorsed by the original lender. (R. 502.) In connection with cattle paper, it was a more desirable in-

vestment for the Iowa National Bank to loan its money to country banks with good collateral, taking the endorsement of the borrower, than it would have been to make numerous direct loans to the farmer. (R. 503.)

The bank made no loans on second mortgages on real estate. (R. 505.)

The bank made no small loans secured by chattel mortgages on furniture, nor assignment of wages. (R. 508.)

The bank did not finance public improvement contractors by taking the improvement certificates or bonds as payment, but took notes secured by assignments of the contract and guaranteed by bond. (R. 522.)

SUMMARY OF ARGUMENT.

I.

Under the pleadings and the facts as shown in the record, appellants can not maintain an action in madamus.

(a) Claims for refund of taxes erroneously or illegally exacted must be presented to the Board of Supervisors.

Bibbins v. Clark & Co., et al., 90 Iowa, 230.
Brownly v. Marion Co., 53 Iowa, 487.
Dickey v. Polk County, 58 Iowa, 287.
Richards v. Wapello Co., 48 Iowa, 507.

(b) The Board of Supervisors shall direct the County Treasurer to refund taxes *found* to have been erroneously and illegally exacted and paid.

Section 7235, Code of 1927.
Section 1417, Code of 1897.

(c) An erroneous assessment is one made when officers have power to act but err in the exercise of the power. An illegal assessment is one where they have no power to act at all.

Ford v. McGregor, 23 Pac., 508 (Nev.).
Griswold v. Calhoun Co., 198 Ia. 1240.

(d) The Board of Supervisors must ascertain whether the taxpayer is entitled to be reimbursed.

Section 1417, Code of 1897.
Section 7235, Code of 1927.
Bank v. Board of Supervisors, 168 Iowa, 501.

(e) The plaintiffs had filed their claims for refund with the Board of Supervisors and such Board had ascertained that their claims should be denied. (Printed Record page 557, line 32, and page 558, lines 1 to 12, inclusive.)

(f) An action of mandamus will lie to compel an inferior tribunal, board, or corporation to do or not to do an act.

Section 12440, Code of 1924.

(g) The action of mandamus will not issue to control discretion.

Section 12441, Code of 1924.

(h) There is a great difference between discretionary acts and ministerial acts:

(1) A ministerial act is one that one performs without regard to his own judgment on the propriety of the act being done.

(2) A discretionary act is one that involves the exercise of judgment based upon facts to be found.

Ferris on Extraordinary Legal Remedies, Section 206.

Clark v. Board of Directors, 24 Iowa, 266.

Preston v. Board of Education, 124 Iowa, 355.

Griebel v. Board of Supervisors, 202 N. W., 379, 200 Iowa 143.

Riley v. City of Des Moines, et al., 212 N. W., 716, 203 Iowa 1240.

Sarby v. Morey, 221 N. W., 492, 207 Iowa, 521.

(i) Before the Board of Supervisors would have been justified in directing the County Treasurer to make refund upon plaintiff's claims they would have to find from the facts adduced:

(1) That other moneyed capital in competition with banks had been assessed at a different rate than shares of bank stock.

(2) That a relatively material amount of moneyed capital was so used.

(j) Under the provisions of Section 7235 of the Code of 1927 and 1417, Code of 1897, the Board of Supervisors not only are required to make a finding of facts before ordering

a refund but also act in a *quasi judicial* manner and mandamus will lie to compel them to act but not to control their action.

Ferris on Extraordinary Remedies, Section 283.
High on Extraordinary Remedies, Volume 1, page 50, Section 42 and 43.

(k) The abatement or reduction of taxes improperly assessed is a judicial rather than a ministerial act.

High on Extraordinary Remedies, Vol. 1, page 158, Sec. 141.

(l) The writ of mandamus can not be used as a means of appeal or as a writ of error.

Ferris on Extraordinary Legal Remedies, Sec. 191-299.
Interstate Commerce Commission, Plaintiff in Error v. Merchants Ass'n of New York, 67 Law Ed., 112.
Woodbury Co. v. Talley, 147 Iowa, 498.

(m) The decision of the Board of Supervisors in denying the refund can not be attacked collaterally.

Scripture v. Burns, et al., 59 Iowa, 70.
Sullivan v. Robbins, 109 Iowa, 235.
Collins v. Board of Supervisors, 158 Iowa, 322.
Littell v. Webster County, 152 Iowa, 206.

(n) Mandamus will not lie to compel the payment of money by public officers if there is no fund out of which it legally can be paid and the burden is on the plaintiff to allege and prove the existence of the fund.

Woodcock v. Board of Education, 10 A. L. R., 181.
Iowa Ry. Land Co. v. Woodbury Co., 64 Iowa, 212.
38 Corpus Juris, page 770, Section 412.
Rice v. Walker, 44 Iowa, 458.
Section 12452, Code of 1927.
Farson v. Baird, 63 Law Ed., 233.

(o) Plaintiff can not maintain this action because the necessary parties are not before the court.

State, ex rel., Volunteer Relief Ass'n of Wilmington v. Mayor and City Council of Wilmington, et al., 118 Atlantic, 640 (Del.).

Rankin v. Noel, County Commissioner, et al., 185 S. W., 883 (Tex.).

(p) Plaintiffs' remedy, if any, as to the action of the Board of Supervisors, is at law.

Section 12456, Code of 1927.

Gaffney v. Young, 200 Iowa, 1030.

Riley v. City of Des Moines, 212 N. W., 716, 203 Iowa, 1240.

Home Savings & Trust Co. v. District Court, 121 Iowa, 1.

Jewett v. Ayres, 167 Iowa, 431.

Woodbury Co. v. Talley, 147 Iowa, 498.

And other cases cited in Brief.

II.

(a) Appellants' remedy was by appeal from the local Board of Review.

Iowa National Bank v. J. M. Stewart, 232 N. W. 445 (Iowa).

Griswold Land & Credit Co. v. Calhoun Co., 198 Iowa, 1240.

First National Bank v. Board of Review, 199 Iowa, 1124.

First National Bank of Newton v. Board of Review, 204 N. W., 223, 200 Iowa, 131.

Lamont Savings Bank v. Luther, 200 Iowa, 180.

First National Bank of Montezuma v. Board of Review, et al., 201 N. W., 769, 199 Iowa 1124.

Nelson v. First National Bank, 42 F. (2d) 30, (C. C. A. 8th.).

(b) When the laws of a state create a tribunal for the correction and equalization of assessments and provide that persons aggrieved may apply to such board for the correction of errors, and confer upon the board powers so to do, it is for the Suprme Court of the state to determine whether the remedy is exclusive, and its action in that respect raises no federal question.

Railway Company v. Patterson, 154 U. S. 130, 14 S. Ct. 977.
First National Bank v. Anderson, 269 U. S. 341, 346.

(c) The decisions of the highest court of a state are conclusive on the federal courts in fixing the power, duties and authority of revenue collecting officers.

Hendrickson v. Apperson, 245 U. S. 105, 38 S. Ct. 44, 62 L. ed. 178.
Hendrickson v. Creager, 245 U. S. 115, 38 S. Ct. 46, 62 L. ed. 185.

III.

The acts of the taxing officers in these cases, even if erroneous or illegal, fall far short of being "the deliberate, intentional and willful acts" such as might constitute a violation of Sec. 5219—U. S. Rev. Stat.

Davenport Nat'l. Bank v. Board, 64 Iowa, 140-3.
Jenkins v. Neff, 46 (U. S.) L. Ed., 1140.

IV.

Where the state law itself is admitted to be not in violation of Section 5219, but it is claimed that the erroneous *administration* of the law is in contravention of Section 5219, then the moneyed capital, as to which complaint is made, must be moneyed capital in competition with the individual bank complaining, and not moneyed capital which might

be in competition with some other bank under same circumstances. And in any event, it must be moneyed capital in a material or substantial amount in competition with some material branch or substantial part of the ordinary and legitimate banking business which is actually being performed by the complaining bank.

Davenport Nat'l. Bk. v. Board, 123 U. S., 83.
Georgetown Nat'l. Bk. v. McFarland, 273 U. S., 568; 47 (U. S.) Sup. Ct. Rep., 467.
First Nat'l. Bk. Guthrie Center v. Anderson, 196 Iowa, 587.
Manning Bank v. Armstrong, 211 N. W., 485-7, 204 Iowa, 512.
Head v. Board, 170 Iowa, 300.
First Nat'l. Bk. Montezuma v. Board, 199 Iowa, 1124-34.
First Nat'l Bk. v. Anderson, 192 N. W. 6, 196 Iowa, 587.
Mercantile Nat'l. Bk. v. N. Y., 121 U. S,, 138.
Aberdeen Bk. v. Chehalis, 166 U. S., 440.
First Nat'l Bk. Newton v. Board, 204 N. W., 223, 200 Iowa, 131.
Jasper Co. Sav. Bk. v. Board, 202 N. W., 387 (Iowa).
Poweshiek Sav. Bk. v. Johnston, 202 N. W., 384, 199 Iowa, 555.
Des Moines Nat'l. Bk. v. Fairweather, 68 (U. S.) L. Ed., 190.
First Nat'l. Bk. v. Anderson, 70 (U. S.) L. Ed., 171.
Mercantile Nat'l. Bk. v. Hubbard, 98 Fed., 465.
People ex rel. v. Goldfogle, et al., 205 N. Y. S., 870.
Affirmed on appeal, 211 N. Y. S., 85.
Affirmed on appeal, 152 N. E., 418 to 420.

A bank cannot buy and sell stocks and bonds of other corporations, or deal in them on commission.

Vol. 1, Morse on Banks & Banking (5th Ed.), Sec. 59, note 4.
People ex rel. v. Peabody, et al., 211 N. Y. S., 114.

National banks cannot exercise any powers not expressly granted or necessarily incidental to those granted. They cannot deal in stocks of other corporations.

California Bank v. Kennedy, 167 U. S., 362.

It must be competition with actual transactions carried on by the bank complaining, not merely in competition with something the bank might do.

People ex rel. v. Goldfogle, 151 N. E., 452 (N. Y.).

National banks cannot lawfully sell and deal in farm mortgages for a commission.

Farmers Mer. Nat'l. Bk. v. Smith, (C. C. A.) 77 Fed., 129-36.

Short time chattel loan companies are not in competition with national banks.

Welfare Loan Society v. Des Moines, 219 N. W., 534, 205 Iowa 1400.

Universal Loan Corp. v. Board of Review, 219 N. W., 536, 205 Iowa 1391.

V.

The corporations who were taxed on their moneys and credits could not constitute competition with National Banks contrary to Sec. 5219, because that statute provides that it must be the "moneyed capital in the hands of individual citizens" that must be taxed the same as National Banks. These corporations are not "individual citizens".

Davenport Nat. Bank v. Board, 123 U. S., 83.
People v. Doty, 80 N. Y., 225-8.
Perkins v. Smith, 23 N. E., 21-3 (N. Y.).
Prim v. Fort, 57 S. W. 972 (Tex.).
Prim v. Fort, 57 S. W. 86 (Tex.).
First Nat. Bank of Aberdeen v. Chehalis, 166 U. S. 440.

Bank v. Chapman, 173 U. S. 205.
Mercantile Bank v. New York, 121 U. S. 138.
Perkins v. Smith, 23 N. E. 21-3 (N. Y.).
People v. Doty, 80 N. Y. 225-8.

VI.

As National Banks were restricted as to the character and locality of the real estate loans they could make, it was necessary to show, in order to establish competition, that the loans made by the individuals and corporations complained of, were the class of loans that could have been made by a National Bank. This, in most cases was not done.

First Nat'l. Bank v. Hartford, 47 Sup. Ct. Rep., 462.
First Nat'l. Bank v. Anderson, 192 N. W. 6, 196 Iowa 587.
Merchants Nat'l Bk. v. Richmond, 256 U. S., 635.
First Nat'l Bank, Montezuma, v. Board, 201 N. W., 769, 199 Iowa 1124.

VII.

There is no such discrimination shown between the taxation of the State Banks and other corporations and individuals as to constitute a violation of either the State or Federal Constitution. The State Banks are creatures of the state and have only such rights as are granted by the State.

Layman v. Telephone Co., 123 Iowa, 591-600.
U. S. Express Co. v. Ellyson, 28 Iowa, 370-7.
Hawkeye Ins. Co. v. French, 109 Iowa, 585-9-90.
Primghar State Bank v. Rerick, 96 Iowa, 238-42-4.
First Nat'l. Bank v. Council Bluffs, 182 Iowa, 107-120.
Des Moines Nat'l Bank v. Fairweather, 191 Iowa, 1240.
Langhart v. First Nat'l Bank, 191 Iowa, 957.
Waterloo Trans. Co. v. Supervisors, 131 Iowa, 237-43.

Iowa Mut. Tor. Ins. Assn. v. Gilbertson, 129 Iowa, 658-67.
Bells Gap R. R. v. Commonwealth, 134 U. S., 232.
Chester v. Penn, 134 U. S., 240.
Home Ins. Co. v. N. Y., 134 U. S., 594.
Pac. Ex. Co. v. Seibert, 142 U. S., 339.
Charlotte Ry. Co. v. Gibbs, 142 U. S., 386.
Jennings v. Coal R. Imp. Co., 147 U. S., 147.
Giozza v. Tierman, 148 U. S., 657.
Warren v. Henly, 31 Iowa, 31.
First Nat'l Bk. of Montezuma v. Board, 201 N. W., 769, 199 Iowa 1124.

VIII.

In no event could the erroneous or even illegal individual acts of the taxing officials or some of them become a violation of the Constitution as it could be reviewed and relief obtained by certiorari. The Auditor could have corrected the error but appellants did not ask him to.

First Nat'l. Bank v. Weber, 196 Iowa 1155.
Sec. 7149—Code of Iowa, 1924.

The Auditor might have been compelled to correct the errors by mandamus.

Ridley v. Doughty, 77 Iowa, 226.
Ridley v. Doughty, 85 Iowa, 418.
First Nat'l. Bank v. Hayes, 186 Iowa, 892-4.

The unauthorized act of an official especially where it is expressly contrary to the state law does not raise a constitutional question or a federal question under the Constitution.

Barney v. City of New York, 193 U. S., 430-8.
Ft. Madison Sec. Co. v. Maxwell, 202 Iowa, 1346.

IX.

The previous appeals from the Board of Review taken by the banks as to these very assessments, and the suits brought in Federal Court by some of them and later dismissed, constituted adjudications. They either did raise, or could have raised in these prior appeals and suits, all of the objections they are now making.

Pierce v. Nat'l Bank of Commerce, 268 Fed., 487.
Taylor v. Taylor, 240 S. W., 6 (Ark.).
Cressler v. Brown, 192 Pac., 417 (Okla.).
Reinkey v. Wilkins, 179 N. W., 751 (Wis.).
Eder v. Fink, 180 N. W., 542 (Minn.).
Village of Winnetka v. Handy, 128 N. E., 805 (Ill.).
Blondel v. Woodbury Co., 212 N. W., 335, 203 Iowa 1099.

X.

The taxes complained of, it is admitted, were not illegal but at most only erroneous. In such case if payment is made it cannot be recovered back unless it was paid under protest. And such protest must point out the very matters complained of. This was not done in these cases.

S. Dak. Sec. N. Bk. v. Twinde, 217 N. W., 542 (S. Dak.).
Hawkeye Co. v. Marian, 110 Iowa, 468.

Nor can interest and penalties be remitted.

Lamont Sav. Bank v. Luther, 200 Iowa, 180.

XI.

The banks, both national and state, were all guilty of laches and are by their acts and omissions estopped to make the claims they are now making. They made no protests for years against the taxing officers assessing their alleged

rivals on the 5 mill basis; they never asked the Auditor to correct the error as he had power to do; they never appealed from the erroneous action of the Board of Review as to their rivals; they appealed as to their assessments but did not raise the present questions; they allowed the taxes paid by them to be distributed to the various taxing bodies without protest or objection; they signed the assessment rolls and agreed to pay the taxes without any objection to the method of assessment, except as to including U. S. bonds; some of them brought suits raising the very questions now raised and then dismissed them and paid the taxes; many of the individual competitors complained of were stockholders in one or more of the banks, and many of the stockholders and officers of the corporation competitors were also stockholders and officers in the banks.

Slimmer v. Chickasaw Co., 140 Iowa, 448-53.
Farmers Ins. Co. v. Linn Co., 202 Iowa, 444.
Sec. 7149, Code of Iowa, 1924.
Fiman v. Hughes Co., (S. D.), 225 N. W., 711.

XII.

The plaintiff banks have not come into equity with clean hands. They have systematically assisted their customers in evading taxation. They have combined together unlawfully to decrease the rate of interest charged by them and to make a charge for carrying small accounts.

13 Corp. Juris, page 444, Par. 381.

XIII.

The banks cannot maintain these suits as they are not the real parties in interest. If any one was improperly taxed it was the stockholders, and not the banks, and the stockholders are the only ones entitled to the refund. The banks have no right to represent them. Many who were

stockholders when these taxes were levied and were paid by them, are no longer stockholders of these banks. There is a defect in parties plaintiff.

37 Cyc., 1187.
Board v. First Nat'l Bank, 57 N. E., 728 (Ind.)
First Nat'l Bank v. Patterson, 176 Pac., 498 (Colo.).
Primghar Bank v. Rerick, 96 Iowa, 238-42-4.
Head v. Board, 170 Iowa, 300-5-6.
First Nat'l Bank v. Council Bluffs, 182 Iowa, 107-14.
Andrew, Supt. v. Munn, Treas., 218 N. W., 526, 205 Iowa, 723.
Stickney v. Bangar, 30 Me., 404.
Fiman v. Hughes, (S. D.) 225 N. W., 711.
Farmers Nat'l Bank v. Hoffman, 93 Iowa, 119-22-4-5.
Sec. 7235 of Code of Iowa, 1924.

Where a bank pays out of its assets the taxes on shares of stock held by the stockholder, such action amounts to the declaration of a dividend.

Redhead v. Iowa Nat'l Bank, 127 Iowa, 572.
In re Feliciana Bk. & Trust Co., (La.) 78 So., 169.
Stapylton v. Haggard, 91 Fla., 93.
Hershire v. First Nat'l Bank, 35 Iowa, 272.

XIV.

There was no discrimination as against the banks in any event, because a five mill levy properly applied to the moneys and credits held by the banks would have exceeded the tax complained of.

Sec. 6992, Code of Iowa, 1924.

XV.

The actions are barred by the Statute of Limitations.

Subdiv. 4 of Sec. 11007 of Code of 1924.
Murphy v. Supervisors, 215 N. W., 744, 205 Iowa 256.

XVI.

The first year's taxes sought to be recovered are those assessed as of January 1st, 1919, and related to the property acquired and held during 1918. There is no evidence offered as to any competition in 1918, so the banks cannot in any event recover the taxes assessed as of January 1, 1919. For the same reason all evidence of competition during 1922 is irrelevant and immaterial, and cannot be considered.

Iowa Code of 1897, Sec. 1323.
Iowa Code of 1897, Sec. 1359.
Iowa Code Supplement of 1913, Sec. 1366.

XVII.

The petitioners have not exhausted their remedy before the Supreme Court of Iowa. This record shows the petitioners have filed a notice of intention to file a petition for rehearing in said court, the Supreme Court of Iowa on said petition having authority to grant a rehearing and to determine the case favorably to petitioners' contention.

Sections 12880-12882, inclusive, Code of Iowa, 1927.

XVIII.

A decree and judgment of the Supreme Court of Iowa does not become final and enforceable until the procedendo is sent down from the Supreme Court to the lower court, and until this is done there is not a final decree from which the petitioners herein can petition for certiorari to this honorable court, as required by Section 237, Judicial Code as amended. The procedendo has not been sent down in this case.

Sections 12875, 12876, Code of Iowa, 1927.

Rule No. 37, Supreme Court of Iowa, is as follows:

"No procedendo shall issue in any case until the expiration of thirty days from the filing of the opinion, except upon an order of the court, or a judge thereof, upon cause shown, and except in criminal cases and cases where petitions for rehearing have been overruled."

Chicago Great Western R. R. Co. v. Basham, 249 U. S. 164.

Andrews v. Virginian Ry. Co., 248 U. S. 272.

Citizens Bank v. Opperman, 249 U. S. 448.

Ohio River Company v. Fisher, 115 Fed. (C. C. A.) 929.

ARGUMENT.

PROPOSITION I.

Mandamus Was Not the Proper Remedy.

Petitioner Banks filed their claim with the Board of Supervisors of Polk County asking for a refund of the taxes complained of, and although the Board of Supervisors had a number of regular sessions and a great number of special sessions, the testimony and record shows that the Banks at no time appeared before such Board and offered any testimony.

Sometime after the claims were filed petitioners brought an action of mandamus in the District Court of Polk County asking that a writ of mandamus issue to compel the Board of Supervisors to order the County Treasurer to refund the sums claimed to have been illegally or erroneously exacted. Among other things the respondents plead that the Board of Supervisors had acted upon the matter and had denied the claims and that mandamus was not the proper remedy. Before the testimony had shown that the Board of Supervisors had acted upon petitioners' claims, and in fact at the very outset of the trial, counsel for the respondents raised the question that the only evidence material in the trial of the case was such as to show that the Board of Supervisors refused to act upon plaintiff's claim, and by stipulation this objection was to stand without repetition. After petitioner had shown by the records of the Board of Supervisors that the Board had acted upon the claims of the Banks, the right of the petitioners to maintain their action in mandamus was again challenged, respondent challenged the propriety of the action of mandamus and moved the Court to transfer to law on the theory that petitioners were seeking a money judgment.

Having called the Court's attention to a few excerpts from the record we now inquire whether or not the action of mandamus will obtain as against the Board of Supervisors. And in discussing this question, while we have heretofore set out our brief points in subdivisions, the cases as we view them are all so closely related that they will be considered more or less as a whole.

ARGUMENT ON PROPOSITION I.

As has heretofore been pointed out, petitioners filed a verified claim for the sums sought to be recovered in this action with the Board of Supervisors, and the Board of Supervisors acted upon said claim and disallowed the same, and petitioners then sought by way of a writ of mandamus to compel the Board of Supervisors to undo the action already taken by the Board and direct the treasurer to make a refund of the amounts claimed by petitioners.

There can be no controversy but that it is necessary that petitions for the refund of taxes claimed to be illegally and erroneously exacted, must be presented to the Board of Supervisors and the cases cited in subdivision "a" of our brief clearly demonstrates this. It is equally as clear that if petitioners were entitled to recover, the money must come from the particular funds to which it has been distributed.

Inasmuch as the claims were presented to the Board of Supervisors and had by them been disallowed, there being no showing in the record as to what evidence was presented before the Board of Supervisors nor no allegations of fraud as against the Board, it must be presumed that the Board of Supervisors acted fairly and impartially in making their decision.

It is further shown by the record that the money paid by the petitioners to the Treasurer of Polk County was distributed to the various political subdivisions of the County

and of the State in accordance with law. Petitioners contend that by the provisions of Section 7235 of the Code of 1927, Section 1417 of the Code of 1897, they are entitled to maintain a writ and secure an order directing the Board of Supervisors to order the refund of the taxes in the amount claimed by appellants. Section 7235 of the Code of Iowa 1927 reads as follows:

> "Refunding erroneous Tax. The Board of Supervisors shall direct the Treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously exacted or paid, with all interest and costs actually paid thereon."

From a reading of Section 7235, and it is the same as Section 1417 of the 1897 Code, provision is made for refunding not only erroneous but also illegal tax, and it may not be out of place to call the Court's attention to the distinction between an erroneous and illegal tax. The clearest definition we are able to present and one which has met with uniform favor is the one found in the case of *Ford v. McGregor*, 23 Pac., 508, wherein the court says:

> "There is a distinction between an erroneous and illegal assessment. An erroneous assessment is when the officers have power to act but err in the exercise of the power; and an illegal assessment is where they have no power to act at all."

Applying this definition to the facts as disclosed in this case we must immediately reach the conclusion that the tax is an erroneous one rather than an illegal one, if subject to either such criticism.

It is our contention that Section 7235 as hereinbefore set forth, establishes and makes the Board of Supervisors a special tribunal for the determination of the fact question as to whether the taxes were erroneously exacted. The manifest design of this statute is that the Board of Super-

visors first ascertain whether the taxpayer is entitled to be reimbursed for taxes claimed to be erroneously exacted, and if so that the Treasurer be directed to refund the same from the several funds to which they have passed.

Our own Supreme Court in the case of *Bank v. Board of Supervisors, et al.*, found in 168 Iowa, page 501, in discussing this section which was then Section 1417 of the Code, and no change has been made therein, said:

> "The manifest design of this statute is that the board of supervisors *first* ascertain whether the taxpayer is entitled to be reimbursed for taxes illegally or erroneously exacted and if so, that the treasurer be directed to repay the same from the several funds to which these have passed. Such was the interpretation given in *Iowa Ry. Land Co. v. Woodbury Co.*, 64 Iowa, 212, where recovery against the county was denied, and this decision was followed in *Everly v. Jasper County*, 72 Iowa, 149. It is the duty of the treasurer only to repay from the particular funds into which the taxes have gone and, when necessary, to ascertain by computation the amount to be taken from each. *District Township of Spencer v. District Township of Riverton*, 56 Iowa, 85. The result attained is the restoration of the moneys illegally or erroneously paid by the taxpayer, and each fund continues as though these had never been collected. The remedy is perfect.
>
> "The duty of the board of supervisors is equally explicit. Having *ascertained* that the taxes have been illegally or erroneously exacted or paid, the statute prescribed precisely what shall be done, i. e., the board shall direct the treasurer to refund them to the taxpayer. Such an order is essential to repayment by the treasurer and to enter it, *in a proper case*, is the mandatory duty of the board of supervisors. * * *." (Italics in the above case and following cases are ours.)

You will note that the Court used the word "ascertain" and ascertain means to find.

It occurs to us that the decision of the Court in this respect was a proper one and leaves no question of doubt as

to the meaning of Section 7235, but had not the court passed upon this matter in the case above cited, we think that a reading of the section would lead to no other conclusion without disregarding the proper definition of the word "found".

By the provisions of Section 7235 of the Code of 1927, Section 1417 of the Code of 1897, the Board of Supervisors were constituted and designated by the legislature as a special tribunal for the determination of fact questions involved in the application. We do not believe that it can be successfully contended that this was not the purpose of the legislature in enacting this section, especially is this true when read in the light of the decision above cited.

Yet notwithstanding the fact that the testimony shows that the claims were presented to the Board of Supervisors and by them disallowed, the petitioners then sought in an action of mandamus to review the decision made by the Board of Supervisors and asked the Court to issue an order compelling the Board of Supervisors to enter an order different than the one heretofore entered by them, (Printed Record Page 557, line 31 to page 558, line 12.) This, as we have heretofore suggested, without a showing as to what evidence was presented to the Board of Supervisors, or without an allegation that the Board acted fraudulently or arbitrarily.

It now becomes interesting and important to read the statute which defines one's rights in the extraordinary action of mandamus. Section 12440 of the Code of Iowa 1927 reads as follows:

> "Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station."

And Section 12441:

> "Discretion, exercise of. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discreion."

Prior to the enactment of the 1924 Code, Section 12440 and 12441 were contained all in one section and were not divided as we now find them, and read as follows:

> "Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discretion. * * *"

From a reading of the statute the natural inquiry presents itself as to what, if any, the difference is between discretionary acts and ministerial acts, and the most concise as well as the universally recognized distinction is best stated in Ferris on Extraordinary Legal Remedies, Section 206, and is as follows:

> "A ministerial act is one which a person performs in a given state of facts and in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment on the propriety of the act being done. The distinction between ministerial and judicial and other official acts is, that where the law prescribed and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial."

Let us now turn to the decision of the Iowa court and we find that without any discord it has announced the rule

that where the duty imposed involves the exercise of discretion based upon the facts to be found, the same cannot be classed as a ministerial act and mandamus will not lie, however erroneous the conclusion reached.

Clark v. Board of Directors, 24 Iowa, 266.
Preston v. Board of Education, 124 Iowa, 355.
Griebel v. Board of Supervisors, 202 N. W., 379.
Riley v. City of Des Moines, et al., 212 N. W., 716.
Woodbury Co. v. Talley, 147 Iowa, 498.

The rule as stated in the *Preston* case is so clearly stated that we quote therefrom:

> "But where the duty imposed upon the board or tribunal involves an exercise of discretion based upon facts to be found by it, mandamus will not lie, however erroneous the conclusion reached; and upon this all the authorities agree. * * * Without question it was the right of the board in the instant case to determine the question of the residence of the plaintiff as a condition precedent to her admission to the schools as a free pupil. The determination of this question did not depend alone upon the age of the plaintiff. Of necessity other facts were to be considered. Conceding now that the board reached an erroneous conclusion, it is clear that the remedy was by a review of the facts and the judgment predicated thereon."

And in *Milwaukee Malt Extract Co. v. C. R. I. & P. Ry. Co.*, 73 Iowa, 98, our Supreme Court said quoting from High on Extraordinary Remedies:

> "Stated in general terms, the principle is that mandamus will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance, but that as to all acts or duties, necessarily calling for the exercise of judgment or discretion upon the part of the officer or body at whose hands their performance is required, mandamus will not lie."

And again in the case of *Griebel v. Board of Supervisors*, 200 Iowa, 143, this being an action in mandamus growing out of the power or the act of the board of supervisors in abandoning a portion of a drainage improvement, our Supreme Court in discussing the matter of when the writ of mandamus will obtain says:

> "Where officers have discretion, mandamus will lie to compel them to act, but not to control discretion. *Perry v. Board of Supervisors of Clarke County*, 133 Iowa, 281; *State v. Parker*, 147 Iowa, 69; *Sweitzer v. Fisher*, 172 Iowa, 266."

Section 4341 of the Code of 1897, reads as follows:

> "The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. Where discretion is left to the inferior tribunal or person, then mandamus can only compel it to act, but cannot control such discretion." (Sections 12440 and 12441 of the Code of 1924).
>
> Under this section, we have repeatedly held that, where a positive official duty is enjoined upon the officer, the remedy of mandamus would lie. *State v. Thomas*, 152 Iowa, 500; *Benjamin v. District Township of Malaka*, 50 Iowa, 648.
>
> *Again, we have held that where the duty imposed involves the exercise of discretion based upon facts to be found by it, mandamus will not lie, however erroneous the conclusions reached. Clark v. Board of Directors*, 24 Iowa, 266; *Preston v. Board of Education*, 124 Iowa, 355.

Thus it is apparent that our courts have held if the act is discretionary, or one that must be determined by a finding of facts mandamus only lies to compel action to be taken, but not to control.

Also in *Woodbury Co. v. Talley*, 147 Iowa, 498 at page 506, the court said:

> "The authority to decide a disputed question implies the exercise of discretion, and this implies the right to decide it for or against the contention of either party. As an abstract proposition, the decision may be wrong, but the wrong is not to be righted by a writ of mandamus. *Meyer v. Dubuque County*, 43 Iowa, 592."

To the same effect is the case of *Charles City v. Ramsey*, 199 Iowa, 722.

Riley v. City of Des Moines, 212 N. W., 716.
Addison v. Loudon, et al., 222 N. W., 406.

The Court in the later case, which is a late Iowa case makes the following statement:

> "The officer (or board) to whom the duty of investigation and power of determination are committed is vested with executive and administrative duties, together with *quasi-judicial* power."

Reading from High on Extraordinary Legal Remedies, Third Edition, Volume One, page 50, Sections 42 and 43, we find the following:

> "Sec. 42. We come next to the consideration of a fundamental rule, underlying the entire jurisdiction by mandamus, and especially applicable in determining the limits to the exercise of the jurisdiction over public officers. That rule is, that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion, or to determine upon the decision which shall be finally given. And whenever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action they are required to exercise any degree of judgment, while it is proper by mandamus to set them in motion and to require their action

upon all matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with exercise of their discretion, nor attempt by mandamus to control or dictate the judgment to be given. Indeed, so jealous are the courts of encroaching in any manner upon the discretionary powers of public officers, that if any reasonable doubt exists as to the question of discretion or want of discretion, they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer."

"Sec. 43. Illustrations of the rule and of its application are so numerous that it will suffice to indicate only a few of the more important. It will be observed that most of the cases in which the rule has been recognized and applied are cases in which the powers of the officer, as to the act sought to be coerced, were powers of a *quasi judicial* nature. *And when the official duty in question involves the necessity upon the part of the officer of making some investigation, and of examining evidence and forming his judgment thereon, a proper case is presented for the application of the rule.* * * *"

And reading further in the same work, Volume One, page 158, Section 141, we find the rule announced *relative to the refunding of assessments which rule is sustained by the great weight of authority in this State and the United States:*

"While, as has been shown in the preceding section, the writ may properly issue to set in motion officers intrusted with the correction of assessments, and to compel them to act upon an application properly presented, the courts will not interfere with or control the action of such officers when they have actually passed upon the application. The abatement or reduction of taxes improperly assessed, is, in such cases, essentially a judicial rather than a ministerial act. Hence it follows that when the proper officers have passed upon an application for the reduction of taxes, and have decided it adversely to the party aggrieved, they cannot be required by mandamus to alter their decision and to make an abatement in the tax. So when school directors have assessed a school tax, the writ does not lie to compel them to

discharge a taxpayer from payment of his portion of the tax, their power, if any, in this respect being discretionary."

PETITIONERS SOUGHT TO USE THE WRIT OF MANDAMUS AS A MEANS OF APPEAL OR AS A WRIT OF ERROR.

As it seems to us, drawing our conclusions from the cases heretofore cited, the petitioners sought to use the writ of mandamus as a means of appeal, or as a writ of error and we earnestly contend that this is not the province of a writ of mandamus. Ferris on Extraordinary Legal Remedies in discussing the question in Section 191 announces the rule as follows:

> "*Not an Appeal or Writ of Error.*—It may be stated here that mandamus may not be used to perform the functions of an appeal or writ of error and thus be used to review errors of law committed by a tribunal acting within its jurisdiction, however inequitable and inconsistent the ruling may be, whether the order be interlocutory or final."

And again in Section 299, in the same work the rule is announced:

> "*Not an Appeal or Writ of Error.*—Mandamus cannot in any event be used as a substitute for an appeal or writ of error to revise or correct alleged errors committed by a court in the proper exercise of its lawful jurisdiction, however inequitable and inconsistent the ruling may be. Where the law imposes upon a tribunal jurisdiction to pass on issues of fact, if evidence has been wrongfully excluded, or a wrongful conclusion of fact has been reached, and errors of law occur, it results from a mistaken judgment which can only be reviewed and corrected in a proceeding in error. * * *."

From a reading of the last two citations of standard works on Extraordinary Legal Remedies it becomes quite apparent that the writ of mandamus can under no circumstances be used as a writ of error, and the Supreme Court of the United States in the case of *Interstate Commerce Commission, Plaintiff-in-Error v. Merchants Association of New York*, 67 Law Ed., page 112, approved of this rule and laid down without any equivocation the doctrine that mandamus could not be so used.

PETITIONERS SOUGHT TO ATTACK THE DECISION OF THE BOARD OF SUPERVISORS IN A COLLATERAL MANNER.

From the authorities and citations heretofore presented we are confident that the only conclusions that can be arrived at are those for which we contend, and if we are correct in this assumption, then petitioners sought to use the writ of mandamus as an action to attack collaterally the correctness of the decision of the Board of Supervisors in the fact controversy involved. That it was a fact question is so plain and so apparent that we do not deem it necessary to enter into discussion of the facts as presented. As to the use of the writ of mandamus in this manner our Court has passed upon the same in numerous instances. Let us call attention first to the case of *Scripture v. Burns, et al.*, 59 Iowa, 70, where the court says:

> *It is averred in the answer that since the commencement of this suit defendants have at the official meeting of the school board, acted upon plaintiff's written request and refused to comply therewith.* Other allegations of the pleadings need not be recited. The District Court dismissed plaintiff's petition, requiring the defendants to pay all costs except the witnesses attending the term, and refused to hear evidence supporting

the allegations of the petition to the effect that the Catholic creed was taught in the school.

"The decision of the District Court was doubtless based upon the ground that the defendants had acted upon plaintiff's request, and that in this proceeding their action cannot be reviewed, and that as no demand required by Code, Section 3378, was alleged in the petition or shown by plaintiffs requiring them to forbid the teaching of the Catholic creed, the action cannot be maintained as to that branch of the case. The decision of the District Court is correct, and is well supported upon these grounds. *The proceeding by mandamus is intended to compel officers and others to act in the discharge of their duties and trusts imposed upon them. It is not designed to review their action when discretion may be exercised, or when it depends upon facts to be ascertained and determined by them."*

To this same end see *Sullivan v. Robbins,* 109 Iowa, 236.
Collins v. Board of Supervisors, 158 Iowa, 322.
Litell v. Webster County, 152 Iowa, 206.

PETITIONERS CAN NOT MAINTAIN THIS ACTION BECAUSE THE PROPER PARTIES ARE NOT BEFORE THE COURT.

The petitioners in their petition did not name as respondents the necessary parties:

State ex rel., Volunteer Relief Assn. of Wilmington v. Mayor and Council of City of Wilmington, et al., 118 Atlantic, 640.

Mandamus will not issue where it appears it will affect persons not before the court whose rights have not been determined in a previous suit.

Reinking, et al., v. Neol County Commissioners, et al., 185 S. W., 833.

These actions affect the State of Iowa, Polk County, the City of Des Moines and the Independent School District of

the City of Des Moines and none of them are made parties to this action.

PETITIONER'S REMEDY, IF ANY, AT LAW.

The Board of Supervisors having acted upon the matter, petitioner's remedy, if any, is certiorari. Section 12456, Chapter 533 of the 1927 Code, reads as follows:

> "When writ may issue. The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy, and adequate remedy."

So it may be seen from a reading of this section that petitioners' remedy, if any, was by certiorari.

Gaffney v. Young, 200 Iowa, 1030.
Riley v. City of Des Moines, 212 N. W., 716.
Home Savings & Trust Co. v. District Court, 121 Iowa, 1.
Jewett v. Ayres, 167 Iowa, 431.
Woodbury v. Talley, 147 Iowa, 498.

Using the case of *Riley v. City of Des Moines* as an example: This was an action in mandamus brought by the plaintiff against the City of Des Moines, et al., including the Board of Trustees of the pension fund wherein the Board of Trustees of said Pension Fund had denied plaintiff a pension whereupon he brought an action of mandamus to compel the granting of said pension which order was granted by one of the Judges of the District Court of Polk County, Iowa. Our Supreme Court in a discussion of the right to the issuance of the writ of mandamus laid down the rule reversing the District Court of Polk County, Iowa, for issuing the writ, saying:

> "Mandamus issues to compel, while certiorari issues to review, official or judicial acts. Mandamus will not lie where a remedy by certiorari is available."

In the case of *Gaffney v. Young*, 200 Iowa, 1031, another pension matter, the court determined that mandamus was not the proper remedy but certiorari was the sole remedy, stating on page 1032 the rule and quoting from *Home Savings & Trust Co. vs. District Court*, 121 Iowa, page 1, as follows:

> "It seems to be fundamental that, when a new jurisdiction is created by statute, and the court or officer exercising it proceeds in a summary mode, or in a course different from the common law, and a remedy for the revision of its exercise is not given by the statute creating it, certiorari from a court having general superintendence and control over inferior jurisdictions will lie for its revision."

Now comparing the *Gaffney* case with the cases at bar do we not have the same situation, are they not in fact parallel cases? We have the legislature establishing a special tribunal of three to determine whether or not a particular person or persons were entitled to a pension, and the Supreme Court saying that it was a special tribunal established for the determination of the fact question and the remedy was solely one by way of certiorari.

In the case at bar under Section 7235 we have seen that the Board of Supervisors have been constituted as a special tribunal to determine the fact question as to whether or not the taxes were erroneously exacted. Yet, the Board of Supervisors having acted upon petitioners' petition and denied the same, they then come into court and claim by a writ of mandamus that they have the right to review the decision of the Board of Supervisors on the fact question. We contend there is no authority in this state which warrants them in this proceeding.

Before the Board of Supervisors would have been justified in directing the County Treasurer to make refund upon petitioners' claims, they would have to find from the facts adduced that moneyed capital in competition with banks had been assessed at a different rate than shares of bank stock and also that a relative material amount of moneyed capital was so used. It can not in our opinion be successfully contended but that where judgment must be found, based upon facts investigated or adduced the public officers or board in acting upon the same acts in a discretionary manner, and that while mandamus will lie to put the board in motion it will not lie for the purpose of controlling the action to be had.

We contend that the assignment in these cases on these petitioners was not an illegal assessment but at the most was only an erroneous assessment. The burden rested upon the Board of Supervisors to determine the question of fact as to whether or not other moneyed capital in a substantial amount was in competition with the banks.

The case of *Woodbury County v. Talley*, 147 Iowa, 498, to our mind clearly sustains our contention and announces the correct rule of law. In this case the Board of Supervisors employed a tax ferret and a controversy arose between the tax ferret and the Sioux City Stock Yard Company, a corporation, relative to the assessment of the property of the corporation and its shares of stock. It appeared that for the years 1903 to 1907 the assessor treated the corporation as a merchant, and did not list or assess any of the shares of stock either to the corporation or to the individual stockholders. As the Supreme Court in its opinion says "Whether this result was accomplished by [illegible]nent or hypnotism does not appear". The tax ferret called the matter to the attention of the County Treasurer and notice was given the shareholders and a hearing was had. The County Treasurer held that there was nothing left to assess against

the Stock Yards Company or its corporate stock. No attempt was made to obtain a review of the decision of the County Treasurer by certiorari or otherwise. Later an action of mandamus was instituted by the County against the County Treasurer, to the petition of mandamus the County Treasurer filed a demurrer contending among other grounds that plaintiff's petition showed that the defendant County Treasurer had considered and determined the matter. The demurrer was sustained, appeal was taken and this Court in disposing of the case and sustaining the ruling of the lower court, discusses the province of the writ of mandamus, and the language of the Court so clearly states our position in this case that we adopt the same as our argument.

From a reading of the foregoing case can one arrive at any other or different conclusion than that the petitioners' remedy is not by way of mandamus? It can not be said successfully, that the filing of a claim before the Board of Supervisors regardless of what was in the claim, would compel the Board of Supervisors to accept the same as entirely true and if they refuse the claim after an investigation and after a hearing on the facts, that it permits the petitioners or claimant to go in to a court of equity, trying an issue of fact before the court without a jury and thus attempt to reverse the decision of the Board of Supervisors.

Let us assume that the petitioners filed their claim with the Board of Supervisors, and instead of disallowing the claim in its entirety, the Board allowed a part thereof. Could it be said that the claimant could bring an action in mandamus to compel the Board to increase the allowance to the full amount claimed?

Therefore, for all of the foregoing propositions we earnestly contend that petitioners had no right to maintain their action of mandamus under the pleadings and under the facts as disclosed by the record.

MANDAMUS WILL NOT LIE TO COMPEL THE PAYMENT OF MONEY BY PUBLIC OFFICERS IF THERE IS NO FUND OUT OF WHICH IT CAN LEGALLY BE PAID AND THE BURDEN IS UPON APPELLANTS TO ALLEGE AND PROVE THE EXISTENCE OF THE FUND.

Woodcock v. Board of Education, 10 A. L. R., 181, 27 Cyc., 1131.
Iowa Ry. Land Co. v. Woodbury Co., 64 Iowa, 212.

In this case there is no showing made that there is any money on hand for the repayment of the claim of petitioners if the same had been ordered by the court, and Corpus Juris, Vol. 38 at page 770, Section 412 lays down the rule as follows:

> "Mandamus will not issue to compel the payment of a claim against a municipality where no appropriation has been made for such payment, or where there are no funds on hand applicable to the payment of the claim, and funds appropriated for one purpose will not be compelled to be devoted to another."

The undisputed testimony in this case shows that the money paid in has been distributed to the State and subdivisions thereof entitled thereto, and that in making the levies for each year only so much is levied as is necessary for carrying on the governmental expenses, so that if this is a correct rule, before petitioners would have been entitled to recover it would be necessary for them to show that there were funds on hand not appropriated or devoted to any other purpose in a sufficient amount to satisfy their claim if sustained. The Supreme Court of the State of Iowa in the case of *Rice v. Walker*, 44 Iowa, 458, recognized this rule:

> "A writ of mandamus will not issue commanding an officer to do what is not within his power to do. If he

has put it out of his power to do his duty, he may be liable to damages to one prejudiced by his act, but in such case mandamus will not lie."

Then again Section 12452 of the Code among other things provides that the order of mandamus shall be returnable forthwith:

"* * * and no return except that of compliance shall be allowed."

Recognizing the fact that a court will not issue an order that it cannot compel the enforcement of, it seems to us that from a consideration of this section there can be no question but that the burden of proof of showing that these respondents could comply with the order, if issued, was upon the petitioners and this proof they did not meet. The reason for the necessity of this proof and of this showing, it seems to us, is clearly stated in the case of *Farson v. Baird*, 63 Law Ed., 233, where the Supreme Court of the United States said:

"Mandamus would be useless if he did not have funds on hand with which to pay and the courts never do the useless thing of awarding a mandamus which could not be obeyed."

PROPOSITION II.

Remedy is by Appeal.

The Supreme Court of Iowa has held in numerous cases involving questions identical with those in the case at bar that the exclusive remedy of the taxpayer is by appeal to the board of review. It has so held in the case at bar as to the individual assessments and in numerous other cases cited in our brief.

This honorable Court has held in substance that where the laws of the state create a board or tribunal, such as the board of review created by the laws of Iowa, for the correction and equalization of assessments, and provide that the taxpayer aggrieved may apply to such board for the correction of errors, and confer jurisdiction upon the board so to do, that the decision of the Supreme Court of the state determining that the remedy by appeal to such board is exclusive is binding upon this Court, and raises no federal question. *Railway Company v. Patterson*, 154 U. S. 130; 14 S. Ct. 977.

In a case submitted to this Court from the Supreme Court of Iowa, to wit, *First National Bank v. Anderson*, 269 U. S. 341, the question of the taxpayers' remedy was first raised in this Court and was not raised in the Supreme Court of Iowa or the District Court of that state. This Court in the cited case said:

> "The Supreme Court of the state treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here."

Thus this honorable Court has recognized that the decision of the Supreme Court of Iowa was final on the question of remedy. Subsequent to the decision of this court in *First National Bank v. Anderson, supra*, the Supreme Court of Iowa has in the cases cited in our brief held that the taxpayers' exclusive remedy is by appeal. Under the decisions of this Honorable Court, to which we have heretofore referred, and as contended in our brief, the decision of the Supreme Court of Iowa on this question in this case is conclusive.

The leading decision of the Supreme Court of Iowa on this proposition is that of *Griswold Land & Credit Company v. Calhoun County*, 198 Iowa, 1240, 201 N. W. 11. The rule announced therein has been repeatedly reaffirmed by the Supreme Court of Iowa down to and including the decision in the case at bar. It is especially to be noted that the remedy which the petitioner in the case at bar contends is not adequate, was followed by not only state banks but national banks by appeal from the board of review. *First National Bank v. Board*, 199 Iowa, 1124, 201 N. W. 769; *First National Bank v. Board*, 200 Iowa, 131, 204 N. W. 223; *Lamont Savings Bank v. Luther*, 200 Iowa, 180, 204 N. W. 430; *First National Bank v. Board*, 199 Iowa, 1124, 201 N. W. 269. The remedy afforded by the statutes of Iowa, which the Supreme Court of that state has held is exclusive, has been found to be adequate by other national banks who raised the very question presented by the petitioner in the case at bar. If the remedy thus afforded is adequate for other national banks and state banks, it is adequate for the petitioners.

In addition to the fact that other banks have found the remedy afforded by the statutes of Iowa to be adequate, the record in the case at bar discloses that the petitioner banks knew, long before the board of review passed upon the assessments and certified the same to the county auditor, what their position was in regard to the classification and assessment, not only of their stock, but the other taxable property in the taxing district as well, and they at that time, with this information and knowledge, could have presented the identical question now raised.

It is contended that the petitioners had no ground for complaint or appeal to the local board of review, for the reason that the assessor had correctly listed and classified the stock of corporations whom the petitioners now contend were in competition with them, and therefore there was no ground for contesting the classification of the bank stock

on the basis of discrimination. In making this claim, however, they overlooked a class of property which they contend is moneyed capital in competition with bank stock,—that is notes and mortgages in the hands of individual citizens. This class of property was listed and classified by the assessor as moneys and credits and not as moneyed capital. The petitioners not only knew of this fact but aided and assisted the assessors in thus listing and classifying a large part of this property owned by individuals. The Iowa Supreme Court has held in this case that if, as contended by petitioners, this class of property was erroneously assessed and classified, their remedy was by appeal from the local board of review. No change was made in the classification of the notes and mortgages in the hands of individuals from that made by the assessor and confirmed by the board of review. The petitioners' remedy, if their contention be correct, was clearly that afforded by the statute of appearing before the local board of review and appeal.

Considering the class of property consisting of the stock of corporations which the petitioners contend were in competition with them and that they reason should have been classed the same as bank stock, viz. moneyed capital, we wish to refer to the opinion of the Supreme Court of Iowa in the case at bar wherein it is pointed out that this class of property was assessed and classified in the manner which the banks contend is the proper and lawful manner by the only official and board authorized to classify and assess property. The change made in the classification of this property was by the county auditor, whose act was unauthorized, illegal and void. The state or the municipalities thereof are not bound by such illegal act, and the petitioners cannot rely upon the illegal and unauthorized act of the county auditor to avoid the payment of their taxes. As the Supreme Court of Iowa pointed out, the taxes upon this class of property are unpaid. The state or the municipalities

thereof, through the proper taxing officials, have authority, and it must be presumed that public officials will perform their duty, to collect such unpaid taxes.

The record in the case at bar shows that the petitioners through their officers, were fully advised of the action taken by the county auditor in making the change in classification. They stood by and permitted these illegal and unauthorized acts to continue without availing themselves of the remedy provided by statute through certiorari. *First National Bank v. Weber*, 196 Iowa 1155, 1163, 1164, 192 N. W. 890. They thus became parties to the illegal act which they now seek to take advantage of to avoid the payment of their taxes.

PROPOSITIONS III AND VI.

Was There Competing Capital Not Taxed as National Banks Were Taxed?

This question was rather fully argued before the Supreme Court of Iowa, both by the petitioners here and the respondents here. However, in the argument here, the petitioner on this question says, "In view of the decision of the Court below, a recitation of the evidence which abundantly lists the existence of monied capital is unnecessary". We are unable to grasp the petitioner's stand in this matter for the lower Court did not conclude that there was competing capital and we believe that it is an absolute distortion of plain language to attempt to construe the Court's decision otherwise. The Supreme Court of Iowa said, "During these years, there were in the City of Des Moines a large number of persons and a few corporations who, *as we shall assume*, were employing monied capital in competition with plaintiffs". This can only be construed as meaning that the Supreme Court does not pass on that question as a fact, but assuming, for the purpose of the argument, the petitioners—plaintiffs

below—still were not entitled to the remedy. That fact issue then is before this Court, and we believe by the attitude of the petitioners in their argument (page 13) they have abandoned this contention because they give this Court no support.

We are truly tempted also to abandon argument on it, but because the matter is important and perchance the Court may consider it, we do submit the argument on that proposition.

In order to arrive at a basis of discussion, we look to Section 5219 of the Revised Statutes of the U. S. to determine *ON WHAT CONDITIONS ARE NATIONAL BANKS TAXABLE?*

We take the statement that "The consent of Congress to the taxation of the property and share of National Banks was evidenced by Section 5219" (Pet. Brief 37) as our starting point. To this consent the Congress has attached by Section 5219 TWO PROVISIONS ONLY:

> a. Not a greater rate than assessed upon other moneyed capital in the hands of individual citizens, and
> b. Shares shall be taxed where bank is located.

This provision (a) must be the basis of petitioner's contention and what that provision means is a controlling element in this case.

We agree then with petitioner that a determination of the meaning of that phrase "moneyed capital" is all important. Our courts have stated the following rules relative to this phrase:

> "The restriction applies as well where the competition exists only with respect to particular features of the business of national banks or where moneyed capital is employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise in notes, bonds or other se-

curities, with a view to sale or repayment and reinvestment." *First Nat. Bank of Hartford v. City of Hartford*, 273 U. S., 548; 71 L. Ed., 767.

And this expression has been amplified in many cases but always the decision centers around the necessity of "competition," "substantially as in the loan and investment features" of national banks. In support we cite every case listed in petitioner's argument.

We must then all admit, *THERE MUST BE COMPETITION* and *WITH SUBSTANTIALLY SAME LOAN AND INVESTMENT FEATURES OF NATIONAL BANKS.*

Accordingly, we ask, WHAT ARE THE FEATURES OF NATIONAL BANK INVESTMENT AND LOANS? and

WHAT IS COMPETITION?

To determine what are the features of national bank loans and investments we may look to Federal legislation and we find regulations as to the features.

We quote from Ch. 461, 39 Statutes at Large, 754, Sec. 24, now Sec. 371, Title 12, Code 1926. From this, petitioner assumed blanket authority to make real estate loans.

Note these required conditions, quoted:

(a) Improved farm land.

(b) Unincumbered farm land.

(c) Upon land within Federal Reserve District. Within 100 miles of Des Moines.

(d) Limited to five years.

(e) Not in excess of 50% of actual value.

(f) Real estate within 100 miles not farm land.

(g) Not more than one year.

(h) Not in excess of 25% of capital or surplus or 33% of time deposits.

(i) Not in excess of 50% of actual value of security.

All such loans were limited in the aggregate to 25% of its capital and surplus or to 1/3 of its time deposits.

Before a company or individual shall be competing—with a "national bank" it must have its capital "employed substantially as in the loan and investment features of national banks." (*First Nat. Bank of Hartford v. City of Hartford, supra.*)

Now then, let us take some of the companies listed by the petitioner in its various tabulations.

Let us discuss the business of the various corporations, twenty-seven in number as to which evidence was taken.

In the statement of facts of this brief is a statement of the testimony relating to the business of each of these institutions. We have attempted in our abstracting the testimony to be accurate and if the Court or our opposing counsel discovers we are in error we stand corrected. We give to the petitioner's counsel credit for the same good intentions, but we find they are inclined to interpret—probably unconsciously guided by the spirit of the old adage "the wish is father of the thought,"—the testimony as they "wish" it to be rather than we believe it is. To make verbose quotations from the record would render no assistance to the Court, yet because of the importance of the case, the amounts involved and the principles of law to be established or followed, we are not justified in failing to be respectably thorough in our discussions.

Directing the Court's attention to Sec. 371, U. S. Code, 1926, above digested and to other bank regulations to be referred to, we attempt to distinguish between the corporations claimed to be in competition and the petitioner bank as to the substantial features of the employment of the moneyed capital.

The Security Loan & Investment Company, instead of limiting its loans to 50% of the value, had a habit of dividing loans—because they were larger than the 50 per cent

theory—into several notes, being one which represented a first class mortgage loan amount, and then the rest divided into smaller notes, which smaller notes were sold subject to the larger note, but all secured by the same mortgage. (Tr. 310.) (Page 1102 of printed record.) These, that is, the notes, which became equivalent to second mortgages, amounted to $300,000 to $350,000. The notes also bore a higher rate of interest and a portion of the interest rights was retained as commission. (Tr. 311.) (Page 1102 of printed record.)

The assessable net assets of the company January 1, 1919, given as $84,619 is the equivalent of its then capital and surplus. This amount was practically equalled by cash on hand $59,000, and Liberty bonds $19,400. The entire balance of all assets, loans, etc., about $540,000 was offset by moneys borrowed from the banks on which interest was being paid. (Tr. 316-317.) (Page 1103 of printed record.)

In 1920 the capital was $50,000 and surplus $14,000. At that time the company owed $700,000 to the banks and were paying interest. (Tr. 322.) (Page 208 of printed record.)

On January 1, 1921, the capital stock had increased and there was a loss and no surplus, and all the assets of $800,000 above the capital and surplus of $109,985 represented moneys borrowed from the banks on which interest was paid on $800,000.00. (Tr. 326.) (Page 208 of printed record.)

On January 1, 1922, $700,000 of assets represented moneys borrowed from the banks for which interest was paid, while the capital and surplus was $133,619. (Tr. 237.) (Page 208 of printed record.)

From these bits of testimony, we find in each case the actual capital used in making the loans was capital of the banks and the banks were being paid the interest and held the mortgages as collateral security. (Tr. 323.) (Page 1103 of printed record.) In other words, in the mortgage busi-

ness, the company instead of being a competitor was a broker or customer for the benefit of the bank. It made loans which banks could not make and by the company's method of operation reduced loans to a form acceptable to the banks as collateral and increased the business of the bank, rather than competing with it. It benefited the bank by keeping the bank's money operating on short time obligations and ready customers for its loans. If the company competed with the bank under these conditions, an automobile paint contractor would be in competition with the paint manufacturer, even though the contractor did work the manufacturer could not do and the contractor purchased his paint from the manufacturer. The job would be undone, unless there were some one to apply the paint. The bank's money would be idle if there was not a machine such as the Security Loan & Investment Company to accomplish what the bank could not do, and by that very accomplishment keep bank funds from being idle.

In addition to this, the Company guaranteed its second mortgages, advanced moneys to construct houses, financed the promotions of subdivisions, all of a type of business the bank could not and would not do. Is this competition, or are the banks "dogs in the manger"?

IOWA INVESTMENT & MORTGAGE CO.

This company was merely a broker, sometimes taking second mortgages for commission. Loans were for 142 months and of the Prudential Insurance Company money. If the mortgage company made advancements, it borrowed money from the banks. (See Statement of Facts of this argument for a fuller statement of its operations.) None of this was business the banks could do.

DES MOINES MORRIS PLAN.

This company was organized to do business with people who had no credit at the banks and to defeat the loan sharks. It loaned on two or three name paper not secured and loans averaged less than $200.00 payable in installments extended over one year. It bought installment contracts in the form of trade acceptances for washing machines, carpet sweepers, etc. The company is not a bank. (Page 254 of printed record.)

None of these types of business did the bank want and none of them could they do.

It is repetition of testimony to try in this way to digest the twenty-seven companies claimed to be competing but we took the three in the order named to show the Court that according to petitioner's witnesses the companies are non-competing. We refer the Court to our Statement of Facts of this argument for a resume of the testimony concerning all these companies.

With special reference to Joint Stock Land Banks, we submit:

Petitioner contended in the state court that these companies are competing with National banks. Their argument is anticipating what we have to say. Generally they say, the passage of the Federal Farm Loan Act, recognized the created institution as in the competing class of National banks.

This does not at all classify the Joint Stock Land Bank as in the same "moneyed capital class" as the National banks, but gives to the Joint Stock Land Bank the same protection as is given national banks against discrimination in favor of capital "employed substantially as in the loan and investment feature of" joint stock land banking.

(*First Nat. Bank of Hartford v. City of Hartford*, 273 U. S. 548.
First Nat. Bank of Guthrie Center v. Anderson, 269 U. S., 341, 70 Law Ed., 303.)

The Congress knew a concession of right to tax was necessary and enacted the reference to 5219, so as to protect the "joint stock land bank" against "other moneyed capital" "employed substantially as in the loan and investment features" peculiar to "joint stock land banks." This is so evident as to hardly justify a statement.

Instead of coming to the conclusion the petitioner's counsel propound, the very fact that a special act was prepared for "joint stock land bank" operation, shows Congress recognized there are many diverse types or classifications into which moneyed capital goes, and that the class of "joint stock land bank" investment was of "a substantially different type of loan with peculiar investment features" distinguishing it from "national banking" features—therefore, a special act and special enactments. Otherwise, a mere amendment would have served the purpose, but no, a "national bank" as such cannot make "substantially" the loans with the "investment features" of those made by the "joint stock land bank." That is the difference and that's why the plaintiffs were basically in error both in reasoning and as to including the two in the same class; and $490,814 in 1920, $424,969 in 1921, and $467,725 in 1922 of plaintiff's claimed competing "other moneyed capital" fades out of the picture.

In fact, we think that only in rare cases is there any evidence of even a substantial transaction by any of the alleged competiting corporations being done in the manner or method followed by banks or that the investment had the "features" of loans and investments as made by banks. That is, when the entire transaction is considered. As an example, a customer needing $11,000.00 is unable to get it at the bank, because his security is only $15,000.00. He ceases to be a bank customer. Instead he goes to one of the companies complained of by plaintiffs. He there obtains $10,000 but, how? He is given a first mortgage loan of $9,-

000.00 on an actual 60% basis, it too often proves to be, or 50% appraised basis of the security and $2,000.00 second mortgage. The $9,000.00 mortgage is deposited as collateral to a loan at one of the banks, legally, properly and to the bank profitably. The $2,000.00 loan is carried by the company and to resort to vernacular "and how long". This, the petitioner says, is "competition". This, we say, is non-competitive but instead a business production for the fortunate bank.

The banks seem to think they have a monoply on "credit". That any individual or institution using "credit" or giving "credit" is in "competition". That is not in keeping with the facts nor the law. It will be noted, the decisions do not say that competitive "individuals" are those making "loans or investments" but those "where money is employed substantially as in the loan or investment features of banking". It is the banking "features" which designate the similarity and not "investment" nor "loan" nor "credit".

Note Mr. Grant McPherrin, president of petitioner, Central State Bank, testifying thus, "A customer who bought a real estate mortgage of the bank, thereby became a competitor of the bank. An individual by becoming a customer became a competitor" and he further opines, "A clothier who extends credit to a buyer of a suit for payment on the installment plan is a competitor." (Page 1179 of printed record.)

It is this same thing running all through the bank's testimony and the only thing they have proven, that is, a great share of business is done on credit. The banks entirely miss the "investment features", except these: (1) a loan; (2) due date; (3) signed evidence of indebtedness, but they do not try to parallel these "banking features": (1) Limit to credit; (2) Limit of time of maturity; (3) Hazard of the loan; (4) Receipt of depositor's money; (5) Bankable quality of paper.

McPherrin says if a man could buy an automobile only on credit by a collateral mortgage or conditional bill of sale and he had to borrow the money from the bank, he wouldn't buy the automobile. On the other hand, he says if one does loan the money on such conditions, as a bank would not, and the sale is thereby consummated, that is an "investment" with the "investment features of banking". Practically the same thing was said by Capps, Slininger, Crawford and McKee and it stamps the character of the bank's contention as to what is "competition" and the value of their judgment as to what is "competition".

Not a bank loaned money to any person with a direct chattel mortgage on the automobiles and where payments were contracted for on installments. (Page 1177 of printed record.)

In discussing the facts as disclosed by the evidence to determine whether included in the term "other money capital" as used in Section 5219 of the Revised Statutes of the United States, definitions have been quoted by counsel for petitioner in their "brief and argument" and with these contentions of fact attempting to avoid discussion of law, we extract from those quotations the tests of "other moneyed capital" stated by the courts, and upon which petitioner relies.

1. *It "does not mean all capital,* the value of which is measured in terms of money".

2. It "is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital' ", i. e., "operations in which the capital invested in national banks is employed".

3. It "includes shares of stock * * * in all enterprises in which the capital employed * * * is money."

4. "It includes money in hands of individuals employed in a similar way invested in loans or in securities for the repayment of money."

(*Mercantile National Bank v. Mayor,* 121 U. S., 138; 30 L. Ed., 895.)

5. It includes "investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking".

6. But it does not include "shares of stock in corporations that do not enter into competition with national banks".

(*Merchants National Bank of Richmond v. City of Richmond*, 256 U. S., 635; 65 L. Ed., 1135.)

"Competition" money as used is defined in decisions quoted by counsel for petitioner.

It is in competition:

7. "Where it is invested in shares of state banks or private banking."

8. "Where it is employed substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment".

(*First National Bank of Guthrie Center v. Anderson*, 269 U. S., 341, 70 L. Ed., 303.)

9. Only where "there is a *clear showing* of such competition, *relatively material* in amount".

(*Merchants National Bank of Richmond v. City of Richmond, supra.*)

10. Only where "capital, *substantial in amount* when compared with the capitalization of national banks, is employed * * * in the *same sort of transactions* as those in which national banks engage and in the same locality in which they do business".

(*First National Bank of Hartford v. City of Hartford*, 273 U. S., 548, 71 L. Ed., 767.)

"The language of the Act of Congress is to be read in the light of this policy" * * * "The main purpose * * * of

Congress * * * was to render it impossible for the State, in levying such a tax, to create and foster an *unequal* and *unfriendly competition*, by favoring institutions or individuals carrying on a *similar business* and *operations* and *investments* of a *like character*".

(*Mercantile National Bank v. Mayor, supra*) and

There will be no remedy, unless "the capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed".

(*First National Bank of Hartford, supra.*)

"Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital."

(*Evansville National Bank v. Britton*, 105 U. S., 322, 26 L. Ed., 1053.)

We discuss the facts then, not unmindful of the law nor with an effort to evade the law as prescribed by Congress and as pronounced by the Supreme Court of the United States, but fully cognizant of it. However, by assuming the law of this case to be as contended by petitioner, we believe as a fact proposition the plaintiff has failed to establish "other moneyed capital" "relatively material" "substantial in amount" "when compared with the capitalization of national banks" "in the same locality" "employed in the same sort of transactions as those in which national banks engage" to be taxed different from the national banks so as to create or tend to "create and foster an unequal and unfriendly competion" or that the "business of national banks would be seriously curtailed".

The argument of petitioner that "the mere fact that competing corporations handled the loans in a *slightly* different

form is utterly immaterial", is not to be taken as either logical nor in accordance with law. Immediately following the contention quoted the petitioner urges as a result that a corporation engaged in the business of purchasing installment contracts from automobile dealers supplies the capital needed by the dealer to carry on his business, and obviates the necessity of borrowing from the banks, ergo it is a competitor. Not at all. The test is not that the "necessity of borrowing from banks is obviated".

If I pay my bills, I obviate the necessity of my creditor borrowing from the banks. If I am a wholesaler and sell on credit, I obviate the necessity of my debtor borrowing from the banks. Under such a test, if I pay my bills or if I sell on credit, I am a competitor of the banks. Such logic could be carried on *ad absurdum*. However, a little thing like that makes no difference to the petitioners, because they deliberately go that far. Witness, the bank president, giving his expert testimony on what is competition with a bank. Mr. Grant McPherrin, president of the petitioner Central State Bank, testifies:

> "We bought bonds because they were quick assets, and we could find a ready buyer and I consider a buyer as competitor."

Also:

> "We sold mortgages to our customers."
>
> Q. And if the customer bought a real estate mortgage of you, did he thereby in your judgment become a competitor of yours?
>
> A. Naturally I would consider him a competitor.
>
> "In other words, the individual by being our customer became our competitor." (Page 1179 of printed record.)

How strange. If you do not use the bank—you are in competition. If you use the bank, you are in competition.

With such absurdities, it cannot be possible the law agrees. Positively then, the test is not that you do or do not use the bank.

The courts have repeatedly said competition is where the money is used in the "same sort of transactions" "substantially as in the loan and investment features of banking."

It is only the "same sort of transactions" with "substantially" the same "features" that must be present.

Let us discuss the types of alleged "competing business"—

AUTOMOBILE SALES.

A company making sales of automobiles and taking a collateral mortgage on the automobile with installment payments, would be in competition with banks, according to Mr. McPherrin, yet "If he could only buy an automobile on that basis and he had to be financed by Mr. McPherrin's bank, he would not buy the automobile." (Page 1177 of printed record.)

It is on such testimony that the petitioners base their contentions that a company buying such paper was a competitor, while the banks in no instance bought such paper but loaned money to houses making such sales of automobiles. The same is true of other commodity sales to which reference is made by appellants in their argument.

The transactions of banks and the sales companies or their backers are not of the "same sort" nor having the "same features."

Not a bank *bought automobile* paper,

Not a bank *bought* automobile paper endorsed "without recourse."

Not a bank made *installment* collections of automobile paper. "It was not the general banking practice to handle

such paper." (Capps p. 366, lines 12-13; Denial Abst. p. 59, line 11.) (Page 496 of printed record.).

The banks (a) *loaned money* to automobile dealers, (b) took a note, (c) of demand sixty or ninety days only, (d) took collateral security sometimes but not installment contracts, and (e) did not own the purchasers' notes or mortgages.

The so-called "competing automobile finance companies" did not (a) loan the money to automobile dealers, (b) did not take a note, of (c) short time or other time, (d) did not take collateral, but (e) bought and owned the automobile paper including the installment contract. They bought with endorsements "without recourse" and took their pay in installments.

The transactions were neither of the "same sort" nor did they have the same "features". Neither did it divert business from banks for with the banks "the automobile would never have been sold". It did increase bank business for banks financed by the "competing (?) finance companies." (Abst. p. 169, lines 20-21,) (Page 299 of printed record.)

CATTLE LOANS.

This type of loan the banks call "competing". The United Cattle Loan & Livestock Corporation is cited as typical competitors. Let us see. The testimony relative to this company is in the Abstract pages 170-171, 187-193, and Denial Abstract pages 27-29.) (Pages 300 and 317 of printed record.)

> "The loans were all secured by chattel mortgages which were first liens upon cattle. Most of the loans were on ordinary feeder stock and ran from sixty days to six months." (Abst. 170, lines 31-2 p. 171,) (Record 300.)

The banks have not testified to a single loan made on security of cattle. The Iowa National Bank bought such paper unqualifiedly endorsed by the Financing Company. In the petitioner's tabulation, however, as to bank business they include notes of country banks, secured by collateral notes secured by the cattle endorsed by the borrowing bank. The estimates of amounts of money so furnished country banks and by them used in making cattle loans is pure guess on the part of the banks. (Tr. 2127-28.) (Page 503 of printed record.) The distinguishing "features" between the "competing business" and the banks are principally these:

a. The banks did not even meet the cattle man.
b. The bank did not loan to the cattle man.
c. The bank loaned the company or cattle finance company.
d. The bank took as collateral, not cattle or stock, but the endorsed note and endorsed mortgage as collateral.

The reverse is what the company did. These very things, the hazard of dealing with cattle borrowers, the number of borrowers, long time quality are things the banks want to avoid, and instead of loan companies being competitors they are relieving the banks of the undesirable features and making it possible to increase the business quantity of the bank.

FINANCING PUBLIC IMPROVEMENT CONTRACTS.

The contention that such business was done by banks and by "competing corporations", must be borne out by more than statement of counsels' contention and must be borne out under the rules of law as to "similar features" and transactions of the same "sort".

Let us take the Iowa National Bank as an example as to how this business was done by them.

In his direct testimony Mr. Capps very definitely states "The bank advanced funds to such contractors for the purpose of defraying expense if the work, having (a) an agreement with the contractors (b) for the purchase from them at a stated price of public improvement certificates or bonds, which (c) they might receive in connection with the work". (Abst. 334, line 30-line 1, page 335.) (Page 464 of printed record.)

However, on cross examination, we get quite a different story. It is this:

(a) Money was advanced on the borrower's notes, (b) which were "demand or for a period of two to three months" and (c) he only thinks there was an agreement to take the public securities, but (d) the notes were secured by an assignment of the contract and a bond to complete the work (Transcript 2350-2351.) (Page 509 of printed record.)

Let us now take the Bond & Mortgage Company of Iowa as typical of the alleged competitors for this business.

"During the progress of the work the company would provide funds to enable the contractor to proceed with his work to meet his payrolls, pay for his material, freight bills and things of that sort, and then when the work was completed the bonds were turned over."

"We usually made these arrangements—to finance the work,—by taking an assignment of the contract and the proceeds to be delivered, before the work was begun. This took eight or nine months."

These "features" are vitally different. The bank had short liquid notes. There was no agreement shown. The contract was collateral security.

The company did not have short paper, did take the contract assigned to it and the proceeds went to the company. This was not security, it was co-operative dealing in the contract.

The banking business was increased because the company borrowed from the Valley National Bank, put up collateral for the loan and told the bank why they were borrowing and the bank did not complain, and knowingly, for the purpose of increasing the corporation's business, permitted the corporation to borrow without any complaint and wished the corporation success. (Page 305 of printed record.)

How can this be competition? It made possible credit circulation with the features the bank could not, but it increased bank business.

MORTGAGE & INVESTMENT COMPANIES.

This type of company is complained of by petitioner as competing. It is true some companies made farm loan mortgages and some banks made farm loan mortgages. The distinguishing "features", however, seem to be the things which the petitioner has full capacity to ignore.

In another part of this argument, we refer to 1926 U. S. Code Section 371, Title 12, setting forth the conditions under which national banks can make farm loans. By reference and to prevent repetition, we here adopt all that is there said.

Petitioner claims in its argument that the Iowa National Bank in one year carried $750,000.00 in farm loans for the Bankers Life Company for a period of approximately three months.

In 1919 it was a provision of the national Banking Act that a national bank could not have in excess of 25 per cent of its capital invested in real estate loans at one time. As to the Iowa National Bank in 1919 $750,000 would be far in excess of one-fourth of its capital. Still on Exhibit "H", the Iowa National Bank's statements of Real Estate loans by it in 1919 includes $760,000 of the Bankers Life Company real estate mortgage investments. (Tr. 1954.) (Page 1141 of printed record.)

However, the notes and mortgages were transferred to the bank and held by them, not until paid, but until the Bankers Life Company took them up again for their own investment. The Bankers Life Company had an agreement so to do.

The agreement was made with Homer Miller as president of the Bank (Tr. 1953). In fact the agreement was in the nature of a *demand* loan with collateral security and "*demand*" was recorded on the ledger card Exhibit "G". The account was paid out March 1, 1919, and ran from $67,000.00 and up to $760,000.00. The Iowa National Bank did not collect nor sell a single one of these mortgages. During these years the bank "made many loans with real estate security as collateral". Note the evasion of the bank on this proposition:

In other words the bank loaned the money to the insurance company and took the mortgages as collateral. If, however, this had appeared as a straight loan it would have been illegal as being more than ten per cent of the capital and surplus, therefore they camouflaged it as above.

> "Q. So that as a matter of fact, what you claim was buying loans from the Bankers Life Company was merely a substitute for extending them credit so as not to get in conflict, if possible to be avoided, with the Acts of Congress and the rules of the controller, wasn't it?
>
> A. My answer is that we did carry them."
> (Printed record page 1141.)

How ridiculous for the Bank to say they invested in Real Estate loans and then to say Real Estate loaning companies were competitors, and to use the Bankers Life Company mortgages as an example of the investment of the bank and also as evidence that the Bankers Life Company was a competitor.

They might well say for it is the same logic (?) "When they loaned money to a shoe factory to operate its business, and the note was secured by a warehouse receipt for shoes, the bank's money was invested in shoe manufacturing. As a consequence the money invested in shoe manufacturing is 'competing'."

If this sort of argument by them be carried to its conclusion all capital is "other moneyed capital", and the decision of the U. S. Supreme Court quoted by our learned adversaries:

> "Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital." (*Evansville National Bank v. Britton, supra*, cited by appellants their argument page 31)

is repealed by petitioner.

This drives us back to a same view of "moneyed capital" with "same features" as used by National Banks. It must mean what it says. Feeders of business and customers of business to and with the National Banks must not thereby be construed to be competitors. It is when they draw business away and when "the business of national banks would be curtailed," (*Mercantile National Bank v. N. Y., supra*) that competition arises and not until then.

It was impossible and illegal for the banks to make this quantity of real estate loans and in fact to make the most of them, but their banking business and ramifications could be and were legitimately increased. And this is competition?

SMALL LOANS $300 AND UNDER.

The banks have furnished lists of numbers of loans they have made in amounts of $300 or less and claim this type of business is competitive with the so-called small loan companies. Let us inquire.

The loans made by the small loan companies were made on security of household furniture or such collateral and paid in installments. The time of payment was either weekly or monthly over a period of six to ten months, and to those who had no credit at the banks.

The banks would not take the furniture or other chattels as securities, had no installment notes, and did not cater to this business. If their notes were paid in installments, it was because notes were not paid when due and extension of time had to be given in order to collect. Never was this done intentionally at the time of the original loan.

How this can be business of the same kind, we are unable to fathom.

NO MATERIAL COMPETITION OF WHICH NATIONAL BANKS CAN COMPLAIN.

In a case brought by a national bank, claiming that there was discrimination under Section 5219 of the Revised Statutes in favor of savings banks, because the national bank was taxed on its shares and the savings bank taxed on its capital, the court held that there was no discrimination. The court holds that, while there may not be absolute equality in the taxation of the two kinds of banks, there was not sufficient difference to justify them in saying the tax was invalid. The court says, in that connection:

> "The taxation of shares in incorporated companies which may have something of value by reason of good

will is not, we think, regarded as resulting in inequality of taxation as between shareholders and others owning property similarly employed. Some slight latitude is allowed in modes of assessment demanded by what is deemed controlling considerations, even though they should not result in absolute equality of taxation."

Davenport National Bank v. Board of Equalization, 64 Iowa, 140-3.

In affirming the above case of *Davenport National Bank v. Board*, the Supreme Court of the United States holds that deposits in savings banks are not such moneyed capital as to be in competition with national banks, and says:

"The whole subject has been recently considered by this court in the case of *Mercantile Bank v. New York*, 121 U. S., 138 (30:895). In that opinion it was held that, while the deposits in the savings banks of New York constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the Act of Congress in such a sense as to require that because they were exempted from taxation, the shares of stock in national banks must also be exempted. The reason given for this is that the institutions generally established under that name are intended for the deposits of the small savings and accumulations of the industrious and thrifty; that to promote their growth and progress is the obvious interest and manifest policy of the State; and, as was said in *Hepburn v. School Directors*, 90 U. S., 23, Wall. 480 (23:112), it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

Davenport National Bank v. Board, Law Ed. 31 U. S. Rept., 94 and 123 U. S., 83.

Georgetown Nat. Bank v. McFarland, 47 (U. S.) Sup. Ct. Rept., 467.

Our Supreme Court, in deciding when it has been shown that there is such competition by other moneyed capital, taxed at 5 mills on the dollar, as to constitute discrimination, has fully discussed the matter in the case of *First Nat.*

Bank Guthrie Center v. Anderson, 196 Iowa 587, from which we have quoted fully under division IV of our argument.

A private bank should not be assessed as "moneyed capital", nor is it discrimination to allow state banks to deduct exempt securities and certain liabilities, while a private bank cannot.

Manning's Bank v. Armstrong, 211 N. W., 485-7.

It is not discrimination against national banks or their stockholders, that private banks may deduct government bonds and stock otherwise assessed, while a national bank cannot.

Head v. Board, 170 Iowa, 300.

Stock in a national bank should not be taxed as moneys and credits. Mortgages held for investment by individuals is not "moneyed capital" in competition with banks.

(Full discussion.)

1st Nat. Bank, Montezuma v. Board, 199 Iowa, 1124-34.

The Iowa Court, in *First National Bank v. Anderson*, 192 N. W., 6, through Judge Arthur states:

> "Speaking to this point, the Court, in *Commercial Nat'l Bank v. Chambers*, 182 U. S., 556, said: 'The claim of the benefit of the provisions of Sec. 5219 of the Revised Statutes of the U. S. is unavailing, for the reason that there was neither averment nor proof of facts taking the case out of the operation of the recent decisions of this Court. These decisions held that the term moneyed capital as employed in Sec. 5219, forbidding greater taxation of shareholders of National Banks than is imposed on other moneyed capital, does not include capital which does not come into competition with the business of National banks, and that it must be satisfactorily made to appear by the proof that the moneyed capital claimed to be given an unjust advantage is of the character just stated."

And the Iowa Court, in the cited case, endorsed and applies the rule, and states its conclusions as follows:

> "It was, therefore, incumbent upon it (the bank) to allege the ultimate facts with sufficient fullness to enable the court to ascertain therefrom what, if any, 'other moneyed capital' is loaned in Guthrie Center and vicinity in competition with the normal and ordinary business of appellant and whether the amount is 'relatively material', the demurrer to the petition was properly sustained."

Amount must be relatively material:

The rule is laid down that the moneyed capital which comes into competition with national banks, must come into substantial competition with it, and must, as well, be substantial in amount.

Cases on point:

Merchants National Bank v. Richmond, 256 U. S., 635.
Mercantile National Bank v. N. Y., 121 U. S., 138.
First National Bank v. Chehalis, 166 U. S., 440.

Thus our own State Supreme Court, in several recent decisions, has denied relief becouse the plaintiff bank had failed to prove that a substantial amount of other moneyed capital in competition with national banks was being favorably taxed.

First Nat. Bank of Newton v. Board, 204 N. W., 223.
Jasper Co. Savings Bank v. Board, 202 N. W., 387.
Citizens Nat. Bank v. Treas., 202 N. W., 382.
Montezuma Savings Bank v. Board, 202 N. W., 386.
Poweshiek Co. Savings Bank v. Johnston, 202 N. W., 384.

As the court states, through Justice Faville, in *Montezuma* case, 201 N. W., 769, *supra:*

> "97 assessment rolls were introduced. In 76 of the assessment rolls which were offered in evidence there was no showing whatever as to the character of the money and credits that were assessed, *nor how the same were obtained by the taxpayer.*"

Thus it is clear plaintiff has the burden of proving not only that other moneyed capital, actually in competition with banks is escaping equal taxation with banks, but that the amount is relatively substantial.

Many cases have laid down as the rule expressing the purpose of S. 5219 as follows:

> "The purpose of the restriction is to render it impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks, or individuals interested in private banking."
>
> *Mercantile Nat. Bonk v. N. Y.*, 121 U. S., 138.
>
> *Des Moines Nat'l Bank v. Fairweather*, 68 L. Ed., 190.
>
> *First National Bank v. Anderson*, 70 L. Ed., 171.

and, hand in hand, with that purpose the cases lay down the additional rule:

> "The term 'other moneyed capital' is intended to include only that capital which is employed in such a way as to bring it into substantial competition with the business of national banks" (cases *supra*).

The Iowa Supreme Court, in *First National Bank v. Anderson*, 192 N. W., 6, expressed the view that the U. S. Supreme Court, in the case of *Merchants Nat'l Bank v. Richmond*, 66 L. Ed., 1135, broadened the rule, and that Congress, in an effort to carry out their intention as expressed in S. 5219, therefore passed the following amendment:

(Act of March 4, 1923, Chap. 267, 42 Stat. at L. 1499 Fed Stat. Anno. Supp. 1923, p. 84) reading now as follows:

"In the case of a tax on said shares, the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of *individual citizens* of such state coming into competition with the business of national banks; provided, That bonds, notes, or other evidence of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

The U. S. Supreme Court, however, in *First National Bank v. Anderson*, 70 L. Ed., 171, takes exception to this opinion in the following language:

"The defendants say that this re-enactment was intended as a legislative interpretation of the prior restriction and that the proceedings resulting in its adoption so show. But, assuming that this is true, the situation is not changed; for the re-enactment did no more than to put into express words that which, according to repeated decisions of this court, was implied before. In *Mercantile Nat. Bank v. New York, supra*, where the terms and purposes of the restriction were much considered, it was distinctly held that the words 'other moneyed capital,' must be taken as impliedly limited to capital employed in substantial competition with the business of national banks. In later cases that definition was accepted and given effect as if written into the restriction. It, of course, would exclude bonds, notes or other evidences of indebtedness when held merely as personal investments by individual citizens not engaged in the banking or investment business, for capital represented by this class of investments is not employed in substantial competition with the business of national banks. Thus in legal contemplation and practical effect the restriction was the same before the re-enactment as after."

Our own Supreme Court, it appears, has been willing to go further in its holdings. Their attitude on the proposition was stated as follows, in the *Anderson* case, 192 N. W., 6:

> "The Supreme Court of the United States, so far as we are advised, has never had occasion to pass upon the question whether money thus loaned may be said to be invested or loaned in competition with national banks. Upon this question, the decision of the Supreme Court, when announced, will be final; but, until that time arrives, we must adopt and follow our own interpretation of its prior decisions and of the laws of Congress. Surely, moneyed capital loaned and invested by banks, as the agents of their customers, cannot be said to be loaned in competition therewith. Competition means rivalry, and the loaning of money by national and other banks for individuals at a profit, or for the convenience of such owners, is lacking in all the essentials of competition."

Accordingly, they have placed their interpretation on the meaning of the section. In *First National Bank of Montezuma v. Board*, 201 N. W., 769, the court says, through Faville, Justice:

> "As said in *First Nat'l Bank v. Chehalis*, 166 U. S., 440, the main purpose, therefore, of Congress, in fixing limits to state taxation or investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a *similar business and operations and investments of a like character.* (The italics are ours.)
>
> In *First Nat'l Bank v. Chehalis, supra*, the court recognizes the fact that moneyed capital may include shares of stock owned by individuals in all enterprises in which the capital employed in carrying on its business is money where the object of the business is the making of profit by its use as money. The case also

recognizes that the term may include money in the hands of individuals employed in a similar way.

"The case is also authority for the conclusion that money invested in corporations, or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments and *investments in mortgages*, does not come into competition with the business of national banks, and is not, therefore within the meaning of the Act of Congress."

The Court further states:

"It certainly cannot be said that a land owner in Iowa, who sells his farm representing a part of the purchase price of said real estate, is the owner of moneyed capital in competition with the business of a national bank. Nor can it be contended that a citizen of the state, who deposits money in a bank and receives a time certificate of deposit therefor, bearing interest, is the owner of moneyed capital in competition with a national bank. Nor can it be said that the citizen of this state, who purchases and owns a real estate mortgage as an investment of funds which he may own, by such a transaction becomes the owner of moneyed capital in competition with the business of a national bank; and yet, such securities and evidences of indebtedness are property subject to classification as moneys and credits, and are taxable as such under the laws of this state."

In this case, it was shown that $60,350.00 represented purely investment loans on real estate, and the $26,150.00 loans on chattel security. The court held it to be moneys and credits, and not within the meaning of S. 5219, and adopts as a rule that investments in mortgages do not come into competition with national banks.

Other recent cases hold in accord with the *Montezuma* case.

Powesheik County Sav. Bank v. Johnston, 202 N. W., 384.
Jasper Co. Bank v. Board, 202 N. W., 387.
Citizens Nat. Bank v. Johnston, 202 N. W., 382.

Under the petitioners' own figures there are only two classes of so-called other moneyed capital that come into competition with the bank stock. These classes are, first, the loan companies which had capital invested in the taxing district, varying from $1,876,000 in 1919, to $6,329,000 in 1922, no showing as to what there was in 1918; second, notes and mortgages in the hands of individual citizens residing in the taxing district.

As we have heretofore pointed out, the plaintiffs' contention, and that which they must prove, to wit, that the taxing and assessing officials were intentionally, systematically and designedly administering the statutes of this state so as to discriminate against the stock of plaintiff banks and in favor of other moneyed capital in the taxing district, cannot be sustained for the reason that the only taxing officials who were authorized to make a classification of property subject to taxation correctly classified the stock of the loan companies in question. This part of the moneyed capital, therefore, must be eliminated from the case insofar as any claim to a systematic and intentional administration of the law discriminating against plaintiffs is concerned, and the only moneyed capital substantial in amount and that it is even claimed is materially in competition is that of the notes and mortgages in the hands of individual citizens. In order that the stock of loan companies or the notes and mortgages in the hands of private individuals can be said to be moneyed capital in competition with bank stock, it must be shown—

(1) That they were moneyed capital within the meaning of Section 5219, R. S. U. S.;

(2) That the capital of each company or individual is substantial in amount as compared with the bank capital, and materially in competition with the banks: In other words, it must be shown that the banks were doing a material part of their business along the lines

in which those claimed to be in competition with them are engaged;

(3) That there is an intentional, systematic plan or conspiracy on the part of the taxing officials to discriminate against the stock of the banks in favor of the other moneyed capital.

In the first place, the capital of any individual loan company, as shown in this record, is not substantial in amount as compared to the capital of the banks, or any one of them. We do not think that it can be contended that all the capital of loan companies in the taxing district can be added together for the purpose of determining whether or not the amount is substantial. If this were true, it might be possible that there would only be one large company with a capital substantial in amount as compared to bank capital and a small company whose capital would not be substantial in amount. The combined capital of these two companies would thus be substantial as compared to bank capital, but the erroneous classification made only of the capital of the large company would not entitle the bank to any relief. This would merely be a sporadic instance of erroneous classification or taxation and not such an act as to entitle the banks to claim that they were discriminated against. If this is true, then each individual company must stand on its own feet and its capital be compared alone with that of bank capital. There is not a company of this nature shown in the record that has capital substantial in amount as compared to bank capital that will bring it within the provisions of Section 5219.

Furthermore, the business of a loan company must be materially in competition with a material part of the bank's business. The fact that banks might occasionally prepare a Will would not warrant the assertion that a material part of their business was the law business. Bank also write insurance but it is not part of the banking business, or even

handle estates in probate as they now do. The banks, as the record shows, are not materially engaged in loaning money in the same manner as the loan companies complained of. Their method and plan of doing business is entirely different and distinct. A reading of any of the citations of the Supreme Court of the United States will substantiate this contention. In other words, as the Supreme Court of the United States in the *First National Bank v. Anderson*, 269 U. S., 341, 70 Law Ed., 295, said in respect to what was other moneyed capital in competition with bank stock, that it must be shown that this moneyed capital is "employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment."

Plaintiffs single out the different features named in this quotation and say "notes", "bonds" and "securities" are in competition with bank capital, while as a matter of fact these investments are not in competition with bank capital unless they are made "substantially as in the loan and investment features of banking". The records show that these investments are not made as in the loan and investment features of banking, but are made in an entirely different manner. In fact, the loans are made in such a way that in most instances the banks would not handle them at all, so it cannot be said that the capital of the loan companies is materially in competition with the business of banks.

It also must be shown that the assessorial bodies *properly charged with and having authority* to make a classification of property, intentionally and systematically carried on a plan or conspiracy to discriminate against bank capital in respect to loan companies. The evidence fails entirely to substantiate this allegation, but on the contrary shows that the bodies properly charged with the classification of property for taxation purposes correctly classified the capi-

tal of loan companies in the manner contended for by the plaintiffs. The county auditor and board of supervisors have nothing whatever to do with the classification of property and, as our court has said in the case heretofore cited, the action of a county auditor in changing a classification is illegal and void.

(*Fort Madison Security Company v. Maxwell, supra.*)

Turning to the notes and mortgages in the hands of individual citizens, we cannot concede that these investments meet any of the requirements necessary to bring them within the provisions of Section 5219 and thus taxable as moneyed capital in competition with banks. A reading of the cases most relied upon by appellant—that is the two recent decisions of the Supreme Court of the United States, in *First National Bank of Hartford v. Hartford*, 71 Law Ed., 767, and *State of Minnesota v. First National Bank of St. Paul*, 71 Law Ed., 744, will fail to show that the decisions supported plaintiffs' contention as to this class of property. In the *Hartford* case the Supreme Court speaks at all times about the capital employed in the *business* of those alleged to be in competition with the banks. Furthermore, the evidence was not contradicted and the court in the cited case, as well as in the other decisions upon which plaintiffs must rely, complains of this fact. In the *Hartford* case the Court said:

> "The evidence might have been directed more in detail to the precise character of the competition. But that offered was uncontradicted, and when it was shown that national banks in the State of Wisconsin having a capital and surplus in excess of fifty millions of dollars are engaged in the business of making loans, and that there is *an extensive loan business* in the state not subjected to the tax burdens of national banks, and it was testified directly that *this business* came into competi-

tion with the business of plaintiff and other national banks, we think that the finding of the trial court was supported by the evidence and should not have been disturbed."

It was testified directly in the case at bar that loan companies and individuals were not in competition with the banks. It was upon this basis that the *Hartford* case was decided and it only refers to the "*business*" of making loans and other investments that come into competition with banks. The individuals shown in the record in the case at bar are not engaged in the "*business*" of making loans on any kind of securities in which the banks deal. The *business* of all of these individuals was something entirely different and distinct from the loan and investment business as featured by banks. In fact there were lawyers, doctors, farmers, drygoods and clothing merchants, retired business men, women, guardians, trustees and other individuals before the Court, but *none of them were engaged in the business of making loans and investments.* This is the same theory upon which the case of *Minnesota v. First National Bank, supra,* was decided. Our contention is clearly supported by the decision of the Supreme Court in *Georgetown National Bank v. McFarland,* decided at the same time as the *Hartford* and *Minnesota* cases, reported in 71 Law Ed., 779, for in the last cited case the Court said:

"Plaintiff in Error, seeking to establish that the favored capital was in competition with national banks, relied principally upon the proof that there were substantial amounts of capital invested in the state by individuals in bonds, notes, accounts and mortgages, aggregating approximately $1,500,000, which it is contended represents moneyed capital in competition with national banks. *But the plaintiff made no attempt to show that there were other businesses or courses* of investment in the state employing moneyed capital in competition with its business or that of other national

banks. The evidence with respect to capital invested by individuals, taken as a whole, falls short of establishing that the capital thus used is employed substantially as in the loan and investment features of banking, in making investments by way of loan or discount or in notes, bonds and other securities, with a view to sale or repayment and reinvestment."

We believe that the Supreme Court of the United States in all of its decisions has established the rule that there must be a competitive *business* with national banks, either carried on by individuals or corporations, and that the capital used in this *business* must be employed substantially as in the loan and investment features of the banking business by way of loan or discount or in notes and other securities with a view to sale and repayment or reinvestment. We do not believe that it can be contended and certainly there is no express language in any of the decisions of the United States Supreme Court holding that investments of individuals in a note and mortgage held for the purpose solely of the individual's profit by obtaining the interest thereon until the note is paid, is in any way employed as in the loan and investment features of banking. To be so employed, the notes must be purchased with a view to sale or re-discount and reinvestment. Not an individual shown in this record is so engaged. It was also said by the Supreme Court of the United States in *First National Bank v. Anderson, supra,* page 304, in regard to whether notes and mortgages in the hands of individuals was moneyed capital within the meaning of Section 5219:

"It, of course, would exclude bonds, notes or other evidences of indebtedness *when held merely as personal investments by individual citizens not engaged in the banking or investment business,* for capital represented by this class of investments is not employed in substantial competition with the business of national banks."

The cited case also quoted from the decision in *Merchants National Bank v. New York*, 121 U. S., 138, 30 Law Ed., 895, which case was most strongly relied upon by us in the *Anderson* appeal.

In addition to the decisions of the Supreme Court of the United States, which we believe when properly interpreted hold that notes and mortgages in the hands of individuals, unless engaged as a business in some feature of the banking business, are not moneyed capital within the meaning of Section 5219, there are a number of recent decisions of the Supreme Court of this state holding squarely that securities of this nature are not moneyed capital within the meaning of said section. We refer especially to the decision of our court in *First National Bank of Montezuma v. Board of Review*, 199 Iowa, 1124, wherein a full discussion of this question is had and a complete analysis made of the decisions of the Supreme Court of the United States bearing upon this question. The only class of property which it was contended was in competition with bank capital in the cited case was notes and mortgages in the hands of individuals. See also *First Nat. Bank of Newton v. Board*, 200 Iowa, 131. There was no evidence or testimony of any loan companies or any business coming into competition with banks. The District Court held that notes and mortgages in the hands of individual citizens, such as are shown in the record in the case at bar, were moneyed capital within the meaning of Section 5219. The Supreme Court, however, in the cited case, at page 1135, said:

> "We reach the conclusion that, upon the record in this case, the trial court was in error in holding that there was moneyed capital within the taxing district which was taxed in any different manner than the shares of appellee bank were taxed."

See also *First National Bank of Newton v. Board*, 204 N. W., 223.

The petitioner has introduced evidence of transactions of various U. S. Land Banks as being in competition with National Banks. It would seem that if the National Banks were already performing the duties of the Land Banks there would have been no need to provide for such banks. Evidently Congress did not consider that the Land Banks would in any way compete with or cause it competition with the National Banks.

We are confident, therefore, that notes and mortgages in the hands of individual citizens fail to meet any of the three requirements necessary in order to entitle plaintiff to relief. Apparently plaintiff has largely abandoned any contention in respect to notes and mortgages in the hands of individuals and relies almost entirely, if not exclusively, upon the illegal classification of loan companies by the county auditor and, as we have pointed out, and the Iowa Supreme Court has held, this illegal act cannot avail petitioner in an action to recover taxes properly paid.

In conclusion we would again draw the court's attention to the rule that has been laid down by it that it is only when the moneyed capital in the hands of competitors draws business away from the banks and when thereby "the business of the national banks would be curtailed", (*Mercantile National Bank v. New York, supra*) that competition arises within the meaning of Section 5219. Applying this rule to the actual situation as disclosed in the evidence of the banks in this case it appears that not only the Iowa National Bank and the Central State Bank but also the Valley National Bank and the other banks as to which evidence was taken were doing all of the business that they cared to do or wanted to do along the lines as to which they are complaining there is competition. They admit that they all got all the real estate loans they wanted, all the automobile loans they wanted, all the cattle paper they could carry or cared about, and also all the small loans, and the evidence further shows

that during this period they were making profits which were unsurpassed in their history, which profits were reflected either in dividends or in increased surplus. It is, therefore, clearly apparent that even if there was a technical violation of Section 5219 on account of the illegal act of the Auditor, the banks, both national and state, did not in any way suffer therefrom. Certainly the claim that they might have suffered under some circumstances would not be sufficient justification for letting them escape their fair share of the taxes on account of an illegal act of one of the taxing officials.

Petitioner is not claiming any title, right, privilege or immunity within the meaning of Judicial Code Section 237. There can be no right, privilege or immunity, to be taxed improperly and contrary to law and in a less amount than the law provides, because some one else is improperly and contrary to law taxed in a less amount than he should be on account of the illegal and improper acts of a ministerial official, such as the county auditor in this case. Petitioner is not claiming that the provisions of the law as to its taxation have not been properly carried out, it admits that they have. What it is claiming is that because certain other persons, who it claims were in competition with it, were allowed by the illegal acts of the county auditor to be taxed at a less rate than the law required, then petitioner should also be allowed to escape a part of its taxes, contrary to law. Thus adding to the wrong already committed against the taxpayers who have been legally taxed and who must make up and pay the taxes escaped by the petitioner and other persons illegally taxed in too small an amount. Certainly no privilege or immunity, under the Constitution of the United States could arise under this state of facts. The Constitution is a shield, and was not adopted for the purpose of perpetuating and increasing a wrong already committed, or to put peo-

ple on an equal basis by allowing them all to commit the same wrongs. The following case supports this proposition:

State v. Hall, 54 Southern 560.

In that case the Supreme Court of Alabama had before it a question of assessment for taxes in which the complainant alleged that her assessment was illegal because while complainant's property was valued at, or near its full value for assessment purposes there was property of other people that had been assessed on the basis of only 60% of its value. The 60% valuation, however, was contrary to the law of the State which provided that property should be assessed at its full value. The Court in holding that under such circumstances the complainant could not appeal to the equal protection clause of the Constitution used language that seems so appropriate in the instant case that we cannot refrain from quoting same as follows:

> "Further comment would seem to be unnecessary. In the present case there has been no discrimination against the appellee by the laws of the state, nor by any of its constituted authorities. It is doubtless true that some of its officers are not enforcing the provisions of its tax laws looking to the assessment of all property at its true value. But the laws forbid discriminaton; nor is there lodged in any tax officer or board, nor even in any court, an unrevisable discretion, nor any diseretion at all, as to the mode and basis of assessments. The 'equal protection of the law' cannot mean equal immunity in its violation or evasion. If the police officers of a city should by concerted agreement, but in flagrant dereliction of duty, enforce the prohibition laws only against certain ones among those engaged in their violation, this does not beget a constitutional right in favor of one thus discriminated against, to operate a blind tiger. To so interpret the fourteenth amendment would be to make of it a Tarpeian rock, upon which may be flung to their death the domestic laws of every state. A condition of maladministration being once established through the

infidelity of public servants, reform might become impossible, since every lawbreaker may have acquired by virtue of the protection of the fourteenth amendment the right to pursue his nefarious course unmolested, so long as others are not disturbed. We are aware that we are stating an extreme case, but it comes fairly within the scope of the argument, and legitimately illustrates the vice of appellee's contention. We are clear in the conclusion that the appellee cannot invoke the fourteenth amendment as a means of evading the rule established by the statutes of this state for the assessment of her property for taxation."

PROPOSITION IV.

It is to be borne in mind in this case that there is no claim that the law in Iowa in and of itself creates any discrimination as against a national bank. The only claim is that the manner in which the law was administered by the taxing officials created such discrimination. Some of the cases seem inclined to lay down the rule that where the complaint of discrimination is based not on the state law itself but on the manner of its administration by the taxing officials, that it is then not sufficient for a complaining bank to show that there was moneyed capital that might be in competition with national banks assessed at a lower rate than the national banks, but the complaining bank must go further and show that there was moneyed capital being assessed at a lower rate which was actually in competition with the individual bank complaining. The reason for this distinction is sound. The discrimination created by law would apply as to all banks and would be presumed to be detrimental to them. A discrimination, however, caused solely by the acts of the taxing officers, whether legal or illegal, can only be complained of if the bank is damaged thereby. No person can complain in a court of law of the infringement of his rights unless he can show some damage and therefore it is essential in that

class of cases to show that the complaining bank has been damaged, or, in other words, that its actual competitors and not its possible competitors have been favored by a lower rate of taxation. This rule, in effect, has been announced by the Iowa Supreme Court in the case of

First Nat'l Bank of Guthrie Center v. Anderson, 196 Iowa 587.

In that case the Court in holding that no showing was made that moneyed capital in competition with the bank had been favored or taxed at a lower rate says:

> "Although it does not appear upon the face of the petition, it is a matter of common knowledge that banks, national as well as state, particularly in the rural communities of Iowa, are the instrumentalities through which much the larger portion of farm loans is made; that many banks, as such, or through others with which they are interested, act as agents of insurance companies and other financial institutions having large sums of money to loan upon farm security; and that the money of individuals is either loaned directly by the bank for the accommodation of the owner, who is its customer, or loans are made in advance by the bank, and later transferred to such other customers as have money to loan. The money of individuals loaned in the community thereby becomes a source of profit to the bank. It is also well known that money borrowed upon farm security finds its way at once, or ultimately, into the local banks, and is drawn out in the regular course of the borrower's business.
>
> "The Supreme Court of the United States, so far as we are advised, has never had occasion to pass upon the question whether money thus loaned may be said to be invested or loaned in competition with national banks. Upon this question, the decision of the Supreme Court, when announced, will be final; but, until that time arrives, we must adopt and follow our own interpretation of its prior decisions and of the laws of Congress. Surely, moneyed capital loaned and invested by banks, as the agents of their customers, cannot be said to be loaned in competition therewith. Competition means rivalry; and

the loaning of money by national and other banks for individuals at a profit, or for the convenience of such owners, is lacking in all the essentials of competition. The petition does not charge that the appellant bank is engaged in loaning its funds upon real estate security. Under the laws of Congress, it could not loan sums in excess of 25 per cent of its capital and surplus, or one-third of its time deposits. The amount of its time de-deposits is not alleged, but the net actual value of its capital, surplus, and undivided earnings is shown to be $91,507.83. It seems to us that the allegations of the petition are wholly insufficient to be made the basis of a holding that the tax in controversy is void because of the large amount of moneyed capital loaned upon farm security in Guthrie County by residents thereof. What amount, if any, of the money thus invested is loaned in competition with appellant is not alleged. We cannot infer from the facts admitted by the demurrer that the moneyed capital referred to is invested in competition with appellant. The burden of showing this fact rested upon appellant. *Merchants' Nat. Bank v. City of Richmond, supra; Boyer v. Boyer*, 113 U. S. 689.

"It was, therefore, incumbent upon it to allege the ultimate facts with sufficient fullness to enable the court to ascertain therefrom what, if any, 'other moneyed capital' is loaned in Guthrie Center and vicinity in competition with the normal and ordinary business of appellant; and whether the amount is 'relatively material'."

PROPOSITION V.

It is to be noted that the provision of Section 5219 of the U. S. Code is that the discrimination forbidden as to taxes as to "moneyed capital in the hands of *individual citizens*". Clearly here the intention was to refer only to money in the hands of natural persons who were citizens of the state, otherwise there is no particular use of using the word individual. It might all have been covered by the word citizen as a corporation can be a citizen of a state but a corporation has never been held to be an *individual* citizen. It was

squarely held by the Court of Appeals of Texas that the phrase "moneyed capital in the hands of individual citizens" referred only to moneyed capital owned by natural persons and not to such capital as belongs to corporations, and this opinion was based on various decisions of the United States Supreme Court. See

Prim v. Fort, 57 S. W. 972.

The United States Supreme Court cases, however, referred to therein as to authority for their finding are set out in a former decision of the same case, to wit:

Prim v. Fort, 57 S. W. 86.

The United States Supreme Court decisions there cited supporting their finding are

First Nat'l Bank of Aberdeen v. Chehalis Co., 166 U. S. 440.
Bank v. Chapman, 173 U. S. 205.
Mercantile Bank v. City of New York, 121 U. S. 138.

In the case of

Perkins v. Smith, 23 N. E. 21-3

the New York court of appeals held that the term "individual banker" was not the same as the term "private banker", as the private banker might include either a person or a corporation, while an individual banker would only denote a person. To the same effect see

People v. Doty, 80 N. Y. 225-8.

Under no other construction can meaning be given to both the words used, individual and citizens. If we are correct in this contention this would take out of consideration all of the corporations as to which the Auditor made the change in the rate of taxation and would leave only the assessments of the various individuals and as to them the Supreme Court of Iowa has held that the remedy as to any error in those assessments was by objection before the Board of Review and appeal to the District Court therefrom, and therefore the

petitioner having mistaken its remedy as to these assessments cannot now be heard in this court.

PROPOSITION VII.

Petitioner, Central State Bank is a state bank, organized under and subject to the laws of the State of Iowa, it therefore cannot claim any rights or privileges under Section 5219 of the Revised Statutes of the United States which applies only to National Banks. Petitioner has no rights here unless it can claim some violation of the 14th Amendment to the United States constitution. Petitioner is however a creature of the state and subject to its laws. It may be deprived of its entire existence by the State that created it, and its rights may be limited and abridged by the state at any time. Even if what the auditor did as complained in this case, in assessing individuals in competition with petitioner at a lower rate, was the law of the state and had been done pursuant thereto, there would be no violation of the constitution as to petitioner, because different classes of people can be taxed at different rates if there is a reasonable classification. The state in creating a bank may provide that if it decides to accept a charter and become a bank, as a condition thereto it shall be taxed at a certain rate, different from other persons or corporations and there would of course be no violation of the constitution. Petitioner as a state bank therefore has nothing to complain of.

The following cases support this proposition:

Layman v. Telephone Co., 123 Iowa 591-600.
Primghar State Bank v. Rerick; 96 Iowa 238-42-4.
Bells Gap Ry. v. Commonwealth, 134 U. S. 232.
Pac. Ex. Co. v. Seihert, 142 U. S. 339.
Giozza v. Tierman, 148 U. S. 567.

The Constitution of Iowa, Sec. 12 of Article VIII, is as follows:

> "Amendment or repeal of charters; exclusive privileges. Sec. 12. Subject to the provisions of this article, the general assembly shall have the power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted."

The provisions of the Code of Iowa of 1927 on this matter are as follows:

> "8376. Legislative control. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

The Iowa Supreme Court says:

> "That it is competent for the Legislature to adopt different methods for ascertaining the value of personal property, and to fix the situs of such property, is well settled. Therefore, it may provide for the taxation of corporations as provided in Section 1323 of the Code and fix the place for the assessment."
>
> *Layman v. Telephone Company*, 123 Iowa, 591-600.

In a case brought by an express company, claiming that the law, providing that the property of express companies should be assessed in the city where such company had an

office for the transaction of its business, was unconstitutional, because the property was not subject to taxation the same as that of individuals, the court held that the law was not unconstitutional and that it was not a special law. The court, in connection with the discussion of the question whether this was a special law and, therefore, unconstitutional, says, as follows:

> "Now, it would seem to necessarily follow, that if the act in question is a special law, for the reason that it prescribes a fixed and specific rule for the assessment of the property of express and telegraph companies, then Section 723 of the Revision which prescribes a fixed and specific rule for the assessment of the property of merchants, and Section 724, which prescribes another fixed and specific rule for the assessment of the property of manufacturers, must also be held to be special laws, and consequently, within the prohibition of the clause of our State Constitution relied upon by appellant's counsel, and quoted above. But these sections are not, and have never been claimed to be, in any sense whatever, special laws. Neither is that act a special law."

The court, in this connection, points out that the provisions of our Iowa Constitution differ from those of some other States where different rulings had been made by the courts, and especially points out that we have no constitutional provision that "the rule of taxation shall be uniform." Nor do we have a provision as in California that "taxation shall be equal and uniform throughout the State." The court, in this case, also cites the many differences in the methods of assessment of taxes against different classes of corporations and individuals which are not a violation of our constitutional provision. The court also incidentally points out in this case that double taxation is not unconstitutional.

United States Express Company v. Ellyson, 28 Iowa, 370-7.

The rule is well settled that the XIVth Amendment cannot be invoked here. The opinion of the U. S. Supreme Court is stated in *Bells' Gap Railroad v. Commonwealth of Penn.*, 134 U. S., 232. The Court, through Justice Bradley, on page 895 of Lawyers' Edition, Volume 35, says, in this case:

> "The provisions in the XIVth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulation, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discrimination against particular persons and classes, especially such as are of an unusual character, might be obnoxious to the constitutional prohibition."

The following are a few of the many decisions holding that the XIVth Amendment does not limit the taxing power of the State by imposing on it any rule of equality, so long as its classification is not wholly arbitrary.

Chester v. Penn., 134 U. S., 240 (33 L. E., 896).
Home Ins. Co. v. N. Y., 134 U. S., 594 (33 L. E., 1025).
Pac. Exp. Co. v. Sichert, 142 U. S., 339 (33 L. E., 1035).
Charlotte C. & A. Ry. Co. v. Gibbs, 142 U. S., 386 (33 L. E., 1051).
Jennings v. Coal Ridge Imp. & C. Co., 147 U. S., 147 (33 L. E., 117).
Giozza v. Tiernam, 148 U. S., 567 (33 L. E., 599).

In the case of *Insurance Ass'n. v. Gilbertson*, 129 Iowa, 658, the Supreme Court of Iowa says:

> "This rule, however, does not prevent the Legislature from selecting certain classes of persons, occupations or property for taxation according to its discretion, provided that its classification is not wholly arbitrary and unreasonable."

Thus it is seen that the burden is on plaintiff to show that our statutes or the deliberate and intentional acts of the taxing officers complained of discriminate between persons and property of the same class.

See also

Missouri v. Duckery, 191 U. S., 165-70.

It is true that the cases we have cited refer primarily to laws passed by the State, as distinguished from their administration, but the same principle would apply, if as claimed by the petitioner, the county auditor or the assessor and board of review had lawful authority to make the assessments complained of, against the competing corporations and individuals on the basis of moneys and credits. Their acts being as claimed legal and pursuant to authority granted to them by the statutes, would under such circumstances be the acts of the State just as much as a statute passed by the legislature. If therefore as stated in the cases above, the State can by direct statute assess different classes of taxpayers in different manners, without violating the constitution, it could indirectly through its proper officers decide which particular class should be taxed in one manner and which in another, without violating the constitution either state or national. And this reasoning would apply equally to a national bank, so far as its claims that the constitutions of both Iowa and the United States have been violated are concerned. It is admitted that all classes of banks, Na-

tional, State and Savings are assessed and taxed on the same basis. There is absolutely no showing that the corporations and individuals whose assessments are complained of were so similar to banks that to put them in another class for purposes of taxation would be a purely arbitrary classification. In the absence of such a showing the petitioner State bank cannot claim a violation of the constitution.

PROPOSITION VIII.

In no event could the erroneous or even the illegal individual acts of one or more taxing officials become a violation of the constitution so that it could be reviewed and relief obtained by appeal or certiorari. The County Auditor could have corrected the error he made but the petitioner never asked him so to do. The Code of Iowa, 1927, Section 7149, provides as follows as to the power of the Auditor:

> "Section 7149. Corrections by auditor. The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property."

and this has been the law of the State during all of the period covered by this suit, and that is all the power that he has.

The Supreme Court of Iowa in the suit of

Ft. Madison Security Co. v. Maxwell, 202 Iowa, 1346

has held that the Auditor has nothing to do with deciding whether certain securities shall be assessed as moneys and credits or as moneyed capital. The Court in so deciding says:

> "Under these provisions of the statutes, in force at the time of the assessments in question, it was clearly the duty and function of the assessor, in the first instance, and of the board of review, to determine whether given money and securities belonging to a corporation other

than a bank or trust company were to be listed and assessed as moneyed capital, under the provisions of Section 1310, or were to be considered in determining the value of the shares of stock to be assessed to the shareholders, as provided by Section 1323. * * *

"Even where, as would appear to be the case in the assessments in question, and as is now required by Section 7008, Code of 1924, the value of moneys and credits belonging to such a corporation is assessed to the corporation, the question of whether given property is to be assessed as moneys and credits or moneyed capital is to be determined by the assessor, subject to review and correction by the board of review. * * *

"We think it clear that the auditor did not have power, under Section 1385-b, to change the classification and assessment of appellant's property from moneys and credits to moneyed capital."

The Supreme Court of Iowa has held in the case of

First Nat'l. Bank of Burlington v. Webber, 196 Iowa, 1155

that the County Auditor had no authority to correct the records as to the assessment against a bank so as to change the assessment made by the assessor and the board of review, and that where he had done so his act was such an illegality that it could be corrected by certiorari to the District Court.

The Supreme Court of Iowa has held in the case of

Ridley v. Gauty, 85 Iowa 418

that the auditor could be compelled by mandamus to make corrections in the tax list.

The Supreme Court of the United States has held that the unauthorized act of an official, especially where it is expressly contrary to law, and where it could have been corrected by proper application to the state courts, which was not done, does not raise a constitutional question or a federal question under the constitution. See

Barney v. City of New York, 193 U. S. 430-8.

In that case this Court says:

> "Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law."

The plaintiffs have reiterated, both in their pleadings and in their objections, and in their questions and in their arguments, that "The taxing officers of Polk County, State of Iowa, did, in each of said years, habitually, wilfully, intentionally, systematically and generally" assess their competitors in the alleged improper manner complained of. Why do they keep repeating this sentence in this identical form? The reason is that it is the mystic shibboleth which the United States courts have fixed upon, in order to be able to say that the *administration* of the law, as distinguished from *the law itself*, is in contravention of the provisions of Section 5219 of the Statutes of the United States. This shibboleth is equivalent to the courts saying that there must be conspiracy and collusion among the taxing officials to accomplish the thing complained of. It presupposes an admission that the act of one taxing officer alone, or the sporadic acts of several taxing officers combined together, would not be sufficient, even in the view of the Federal courts, to constitute a violation of Section 5219. Of course, as to the state courts, this shibboleth does not apply at all. That is not the test in the state courts as to whether the action of officials, if it ever can be unconstitutional, is unconstitutional or raises a constitutional question. This is strictly a catch word or phrase of the Federal courts as bearing upon competition of national banks, and, of course, it is not a test of constitutionality at all. It is merely a test of whether the administration of the law, as distinguished from the law itself,

is in conflict with Section 5219. We do not have to worry then with this phrase with regard to the state banks. Taking up the national banks, however, let us see whether, in this case, they have brought themselves even within their own definition. The only assessments as to which all of the taxing officers apparently agreed was the assessment as against moneys and credits in the hands of individuals. The Assessor and the Board of Review classified them as moneys and credits and the Auditor transferred them to the tax list of Polk County as moneys and credits and they were taxed on the five mills basis. There was no collusion or conspiracy about it. These officers just figured that that was what the law said to do and they did it. However, the individual taxpayers no longer cut very much figure in this suit. As we understand the plaintiffs, at least in their oral argument in the District Court, they have practically abandoned their position that the taxation against these individuals would, either in amount or for any other reason, raise the question of material competition with the national banks, and the Supreme Court of Iowa has held that their remedy as to these was by appeal, so there is no need to discuss that further. As to the corporations, however, claimed to have been in competition with banks, there was no agreement among the tax authorities. The Assessors and the Board of Review taxed them all as corporation stock which would have resulted in taxation at a higher rate than the moneyed capital rate. The auditor changed these from corporation stock to moneys and credits. Certainly, this would not indicate anything, either habitual, intentional, systematical, or general, on the part of the taxing authorities, as they seem to have been divided among themselves as to what should be done. The major portion of them wanting to do it in the manner in which the plaintiffs claim was correct, and one individual only, without any apparent authority of law, desiring to do

it the other way. This would seem to us to fall far short of such an administration of the law, which, even under the plaintiff's own definition, would come in conflict with Section 5219.

In addition to this, the Auditor testified that, in making the changes and classification, he acted in good faith and in the belief that he was assessing these corporations as they should be assessed under the law. This would show that there was no habitual, wilful, intentional, systematical or general attempt, on his part, to violate the law, or to create improper discrimination as against the plaintiff national banks.

It is clear, therefore, under the above authorities that there was no violation of the Constitution or of Section 5219 on account of the illegal acts of the Auditor in changing the assessment of the corporations. The assessment of the individuals is no longer in question here as the Supreme Court of Iowa in its opinion in this case has held that the remedy of the petitioner in such a case was by appeal from the board of review and that being a question of remedy or State practice the United States court will not interfere with the decision of the Supreme Court of Iowa on that point.

PROPOSITIONS IX AND XI.

Adjudication, Laches and Estoppel.

The doctrine of *res adjudicata* applies as well to tax proceedings as to ordinary litigation between individuals.

Blondel v. Woodbury Co., 212 N. W., 335.

Beginning on page 148 of Appellees' Denial of Abstract and continuing to page 271 of the same being pages 1214 to 1316 of the printed record in this court are set out the pleadings that were offered as evidence in various prior

cases brought in the State Courts by the appellant banks and which we claim constituted an adjudication. In addition to these the petitioners, Iowa National Bank and the Central State Bank brought injunction suits in Federal Court to prevent the collection of these very taxes and raised all the questions raised here and later dismissed the suits. See Appellants' abstract, page 695, being page 825 of printed record here.

The first case is *Iowa National Bank v. Barton, Mayor,* set out on page 166 of denial of abstract being page 1228 of the printed record in this case. This was an appeal from the Board of Review on account of assessment made as of January 1, 1920. The objections raised in this case were not only that they did not deduct United States Bonds and stock in the Federal Reserve Bank, but also raised the very question raised here, that stock of the National Bank was assessed at a greater rate than assessed upon other money capital in the hand of individuals within the state. In this case a stipulation was entered that it was to follow the case of the *Des Moines National Bank v. Fairweather,* then pending in the Supreme Court of Iowa and pursuant to that stipulation the case was dismissed. As this case was decided it was a complete adjudication of the questions raised in the present suits in that the same questions were raised and the case in accordance with the stipulation was decided against the bank and dismissed with prejudice.

The next case is *Central State Bank v. Barton,* beginning on page 179 of Appellees' Denial of Abstract being page 1237 of the printed record in this case. This case also involved the assessment as of January 1, 1920. This was also an appeal from the Board of Review and the only objection made was that there had not been deducted certain Liberty Bonds and stock in the Federal Reserve Bank. This case was governed by the same stipulation that it should follow the *Des Moines National Bank v. Fairweather* and pursuant to

that stipulation it was decided against the Central State Bank and the cause dismissed. Here again is an adjudication not only of the questions they did raise, but the questions they might have raised, including those they have raised in the present suits.

The next suit is found on page 223 of amended abstract being page 1270 of the printed record here, and was brought by the *Iowa National Bank v. Barton, Mayor*, and was an appeal from the action of the Board of Review with regard to the assessment made as of January 1, 1921. On this appeal they not only raised the question that the Board should have deducted certain Liberty Bonds from the bank's assessment, but further on page 227 being page 1279 of printed record, they raised the question that the assessment was erroneous and contrary to United States Statutes because there was moneyed capital in the hands of individuals in competition that was taxed at a lower rate. In this suit all of the questions raised in the present suit were pleaded and under a stipulation that the case was to follow the result in the case of *Des Moines National Bank v. Fairweather*. On the decision of the latter case the Iowa National Bank case was dismissed. This was a complete adjudication of all the questions raised in the present suits because the identical questions were raised in that suit and were decided against the Iowa National Bank.

The next suit is found on page 245 of Appellees' Denial of Abstract being page 1287 of the printed record here and is brought by the *Central State Bank v. Barton, Mayor*, and is an appeal from the Board of Review on account of its refusal to deduct from the assessment made of January 1, 1921, certain Liberty Bonds and War Savings Stamps and Stock in the Federal Reserve Bank owned by the bank. This suit also followed the case of *Des Moines National Bank v. Fairweather* and after the decision of that case was dismissed and constituted an adjudication against the Central

State Bank on all of the questions that might have been raised on the assessment as of January 1, 1921.

In addition to these suits the Iowa National Bank, now the Iowa-Des Moines National Bank, and the Central State Bank each brought a suit in the United States District Court for the Southern District of Iowa asking an injunction against Allen Munn as County Treasurer of Polk County, Iowa, to prevent him from collecting the identical taxes which they are now seeking in this proceeding to recover. These suits were brought at the same time as the suits of the Des Moines National Bank against Allen Munn, County Treasurer, and the petition filed and questions raised by Iowa National Bank and Central State Bank were identical with those raised by the Des Moines National Bank in this *Munn* suit, which was later carried to the Circuit Court of Appeals and decided against the Treasurer, being the case that is claimed by the petitioner in this case to be an adjudication as against the respondents. For some reason, however, the Iowa National Bank and the Central State Bank neither one of them prosecuted its suit to a conclusion but voluntarily dismissed the same. If this does not constitute an adjudication it certainly would constitute estoppel and laches on the part of these peitioners. The respondents surely had a right to assume, when suits were commenced raising these very questions and were later dismissed after the respondents or those who represented them had gone to the expense of procuring counsel and preparing to defend the same, that the petitioners had abandoned their claims as to illegality of the taxes and had acquiesced in the action of the respondents and were going to pay the taxes. And as a matter of fact the record shows that they did later pay these identical taxes, in some cases with protest and in some cases without. The record showing that the respondents have gone ahead and disbursed the taxes to the various spending bodies, relying, or certainly with the right to rely, on the acquiescence of these petitioners and the

dismissal or adjudication against them of the various suits they brought, it would not now be fair and equitable to require the respondents to collect back from the various taxing bodies this very money which has been disbursed as above outlined.

In this connection and as bearing on this question of estoppel and laches we would also call the Court's attention to the fact that all, or practically all, of the assessment rolls of the petitioners that were introduced had written upon them a statement signed by an authorized officer of the bank in the following form or in equivalent form: "Iowa National Bank agrees to pay the taxes justly and legally due on the assessment made to the stockholders of this company for the year 1920." See Appellant's abstract, page 658, now Page 787, l. 34 of the printed record here. It is to be noted too in connection with this agreement to pay there was no statement or claim made in any case as to any objections that was being made by the bank to the assessment.

We contend, therefore, that these suits or appeals constituted adjudications against the banks with regard to the taxes involved in each case the same being most of the taxes involved in these cases. With regard to the two or three cases that were dismissed without prejudice, if they were not an absolute adjudication they certainly created an estoppel which would prevent the banks in this late day from claiming they had objections other than they raised on these appeals. This is especially true in view of the fact that the officers of Polk County and the other taxing bodes had a right to assume, and did assume that these were all of the questions that the banks had in mind. This particular question especially of deduction of Liberty Bonds having been decided against them in the case of *Des Moines National Bank vs. Fairweather* and all of these cases being dismissed and the taxes paid, the taxing officers had a right to assume that this was a closed incident and they could distribute the money

and act on the assumption that the taxes were properly levied and did not have to be refunded; and they expended the money on that basis and in that belief.

The following cases support our contention.

Where a person voluntarily listed his property in a certain county and voluntarily paid the tax and the taxing body incurred debts, made estimates and paid out money relying on the assessment the taxpayer is estopped to recover it back. The payment of taxes under mistake of law will not entitle recovery under Iowa statutes. This was held in the case of

Slimmer v. Chickasaw Co., 140 Iowa 448-53.

The following cases support the proposition that a former judgment is a bar or estoppel against a prosecution on the same claim or demand between the same parties and concludes them not only as to what was offered to maintain or defeat the claim but as to any other admissible matter that might have been offered.

Pierce v. National Bank of Commerce, 268 Federal 487.
Taylor v. Taylor, 240 S. W. 6.
Cressler v. Brown, 192 Pac. 417.
Reinkey v. Wilkins, 179 N. W. 751.

In the case of

Elder v. Fink, 180 N. W. 542

the Supreme Court of Minnesota held that a final judgment in a former action between the same parties is conclusive as to every matter which might have been properly litigated in that action and is a bar to a subsequent action although in form and remedies sought the two actions are different.

In the case of

Village of Winnetka v. Handy, 128 N. E. 805

the Supreme Court of Illinois held in a tax assessment case that in proceedings for confirmation of a supplemental as-

sessment for local improvements objections to the validity of the original assessment could not be raised since the judgments confirming original assessments were conclusive as to everything that was or could have been raised at that hearing.

The Supreme Court of Iowa has held in the case of

Farmers Insurance Co. v. Linn County, 202 Iowa 444

that where a person who is the chief stockholder in a corporation has the property of the corporation taxed under the consolidated levy the corporation cannot later have a refund on the theory that it should have been assessed only five mills. That that is not such an erroneous assessment or tax that would entitle them to recover it.

See also the case of

S. Dak. Sec. Nat. Bk. v. Twinde, 217 N. W. 542.

PROPOSITION X.

Protest Not Sufficient.

It must be admitted that the taxes in question were not illegal and void within the definition of these terms by the Supreme Court of this state. If this is true, payment of the tax without a definite protest waives any right to complain and the taxpayer is estopped from contesting the validity of the payment. The payment of merely an erroneous assessment, if it is to be recovered subsequently, must be under a protest that is sufficiently definite to point out in a general way, at least, why it is claimed the tax is invalid. Few of the protests, as shown by the record in the case at bar, point out or attempt to even indicate in what respect it was claimed the tax was erroneous or illegal. The tax officials were left entirely to draw upon their own imagination for reasons to sustain the protest. Certainly such a protest is not sufficient

to authorize a taxpayer to subsequently bring an action for the recovery back of the taxes paid. In most cases no protest whatever was filed and the receipt was merely marked "Paid under protest" by the Treasurer. It isn't even shown who was protesting or what they protested about.

The right to recover taxes exists only when taxes are paid under protest and on compulsion to prevent seizing of goods.

Hawkeye Co. v. Marion, 110 Iowa, 468.

The only exception to this rule is that where the tax is *absolutely void* recovery might be had under the refund statute, even though paid without protest, if the illegality was discovered "after he had paid the same."

In the case at bar no one claims the tax is void, but only that it is too much; and also the petitioner admits that it knew all about the illegality before and at the time that it paid the tax.

In one or two cases no protest was made at all when the taxes were paid. In many other instances, the only protest was a statement written upon the tax receipt by the Treasurer and not by the taxpayer, stating that it was paid under protest. No details were given as to the reason for the protest. In a few cases there were filed with the Treasurer written protests, giving the reasons therefor. None of the protests which did not fully set out the reasons were such protests as the law would recognize, as the person protesting must point out to the tax authorities his objections and not leave them to guess as to what their objections are, or on what particular ground they claim the tax is erroneous or illegal. One of the United States Supreme Court cases cited by plaintiffs makes the remark that plaintiffs could not be expected to hunt through the tax records and find out who had been erroneously assessed. If this is correct, it would certainly apply just as strongly the other way, and the tax-

ing authorities, on a protest being made without any reasons annexed, could not be expected to look all through the records and pleadings to find out what errors there might happen to be to which the banks might be objecting. The volume of evidence in this case shows what an impractical proposition it would be to require the taxing authorities to make a guess, or to assume that any one could imagine that most of the assessments introduced in evidence by the plaintiffs would be considered as being in competition with banks. This would require a more vivid imagination than most taxing officers possess. In fact, only such an imagination as is possessed by some banks and their attorneys. See pages 869 to 871 of appellant's abstract, on pages 999 to 1003 of the printed record for form of protests.

Even if the protests had pointed out the objection of the banks that there were persons and corporations in competition with them who were being erroneously assessed, this would not be sufficient for the very reasons pointed out above, unless the objectors also pointed out the very individuals, or, at least, some of them, that they claimed were being so erroneously assessed. In no instance did the petitioner bank, in its protests, give the names of any individuals or companies who, in their opinion, were in competition with them and illegally assessed. The only place where this was done was in one or two of the appeals from the Board of Review, in which appeals the bank raised the objection that their competitors were not being properly assessed and named three or four of their competitors. In those instances, however, the suits and appeals were decided against the bank, so that their claim, in those cases, has been adjudicated against them. Even on the witness stand the bank officers were unable to name more than one or two of their alleged competitors. And in some instances could not even name one.

The rule seems to be that unless the tax is absolutely void, in order to recover back after it has been paid, the payment must have been made under protest and under a protest pointing out the very objection relied upon.

It is admitted by the petitioner bank, in its pleadings, that the tax officials of Polk County had authority to levy some tax upon their property. The only dispute is as to the amount of it. The tax, therefore, was not illegal or void. If there was any wrongful tax levied, it was merely through mistake in judgment of the taxing authorities. It was not, therefore a tax that was erroneous or illegal within the meaning of Section 7235 of the Code of Iowa, 1924, which is the section under which petitioner brought its suit.

PROPOSITION XII.

The Plaintiff Banks Have Not Come Into Equity With Clean Hands.

1.

The evidence shows, without contradiction, in fact, the officials of the plaintiff so testified, that all of the state banks assisted their customers in evading taxation as to mortgages sold to them by the banks. The method in which this was done was that the customer would not record his assignment. In some instances, it even remained in the hands of the bank itself, and, in many instances, all papers connected with the loans remained with the bank. In this way, there was nothing of record to show that the customer was the owner of this particular mortgage. Later, in order to assist the customer in keeping from the record anything that would indicate that he was the owner of the mortgage, and, knowing or suspecting, as they admit, that the customer was doing this for the purpose of evading taxation, the banks had, at

the request of the customer, released the mortgage on the record, although they had no longer any interest in the matter and knew they had no right to so release it. It was shown, in several instances, that the customer, to whom these mortgages were sold, did not return them for taxation. And the banks knew, or at least suspected, that this was the situation. It is true neither of the national banks engaged in the reprehensible practice for the simple reason that they owned and sold no real estate mortgages. However, the evidence does show that the Valley National Bank used the Valley Savings Bank as really a part of its own organization and, for certain purposes, and in the same way, the Iowa National Bank used the Des Moines Savings Bank & Trust Company, in connection with its business and for carrying on certain lines which the national banks themselves could not carry on, and both of these subsidiary state banks were officered and engineered by the same officers, although not always in the same position, as the national bank. The officers, therefore, of both the national banks connived at and assisted their subsidiary state banks in this practice of helping their customers evade taxation and they are, therefore, tarred with the same stick as the state banks and do not come into this case with clean hands. They are seeking here to recover back taxes paid by them when, at the same time and down to the present, they were assisting their customers to evade taxation and were thus defrauding Polk County and the subsidiary taxing bodies out of a large amount of taxes.

2.

The evidence further shows that both of the petitioner banks, either directly or indirectly, through an organization known as the Des Moines Clearing House Association, combined, contrary to the Statutes of Iowa, for the purpose of

raising the price of their commodity which they dealt in or decreasing the price of the commodity which they were purchasing, by making regulations through the Clearing House, which were observed by all the banks, decreasing the amount of interest that would be paid upon savings bank deposit, and, in addition thereto, making a charge for carrying small accounts, thus refusing the use of the bank to individuals of small means, contrary to public policy, and contrary to the purposes of the law under which they were organized, and the advantages of which they took to themselves. And such action was also illegal, because contrary to the Statutes of the State of Iowa as to restraint of trade and combinations. That the plaintiff banks, having thus violated the laws of the State, and having refused to carry out the purposes for which they were allowed to be incorporated by the State, have forfeited the right and are not in the position to now claim that they should recover back from the State, or from some of its branches, any amount of money which they may claim to have been erroneously collected from them, until, at least, they themselves are willing to do equity and abide by the laws of the State.

THE PLAINTIFF COMING INTO EQUITY MUST COME WITH CLEAN HANDS.

In discussing this proposition, it is necessary to call the Court's attention to what might be termed the "atmosphere" of this case as well as to specific evidence.

While seven cases were tried on the same testimony, each case stands separately and upon its own record. "It is stipulated * * * in each of the seven cases * * * that the cases shall not be consolidated, but that the testimony shall be taken at one time *insofar* as applicable shall apply to all the * * * cases * * *. Separate judgments and decrees shall be rendered in each case." (Tr. 4-5.) (R. 133-4.) It is, there-

fore, conceivable that one case can be successful and another fail.

We, therefore, want to call to the attention of the Court the specific things in the actions of each of these plaintiffs, which we believe conclusively establish their want of clean hands and that they positively have besmirched themselves with inequitable conduct and by that conduct created the situation such as they in their sanctimonious virtue *complain as unbearable* and *discriminatory*.

CENTRAL STATE BANK.

Outside of those considerations which are applicable to all the plaintiff banks, there is special testimony relative to each bank as to its attitude and conduct. The spokesman for the Central State Bank is its president (Tr. 2769), Grant McPherrin, who, as cashier in 1913, vice president in 1915, and president in 1921 (Tr. 2769) knew all about its business. He tells us that every bank, as a matter of practice, would sell a mortgage, make an assignment executed by the bank and the assignment would not be placed of record but at the expiration of the term of the mortgage, the release of the mortgage would be made by the bank. That was done as a matter of practice by the Central State Bank in the years 1918, 1919, 1920, 1921 and 1922. (Tr. 4684-5). "Many of the buyers of the mortgages, by failing to record their mortgages, were in truth and in fact dodging taxes", and Mr. McPherrin knew they might be or they might not be. (Tr. 4689.)

IOWA NATIONAL BANK AND DES MOINES SAVINGS BANK & TRUST COMPANY.

Mr. Clyde E. Brenton, its vice president, gave the following testimony:

Q. Do you happen to know whether or not it was a custom of your bank, the Des Moines Savings Bank & Trust Company, after it had sold a loan to an individual and made an assignment to the person who purchased it, to later release the mortgage of record in the name of the bank at the request of the person who had purchased the mortgage—or do you know as to that?

A. Very little, except that if we sold a loan and assigned it and the assignment had not been put of record and they came in and asked to make a release of the mortgage and returning us the assignment, we would do so.

Q. You would do so?

A. We would not force them to file their assignment and file the release.

Q. Nor would you force or investigate to see whether or not they had returned that loan for taxation, I assume?

A. We did not.

Q. Of course, you knew, did you not, that that was one method of dodging taxation used by certain people so inclined, that is not recording the assignment of the mortgage and then get the original mortgagee to release it later?

A. That would be up to the man making his own assessment. A great many of these people had offsets. We had nothing to do with their listing of moneys and credits or any of their other affairs.

Q. I don't think that answers the question, Mr. Brenton.

A. I suspected that that might have been done but we were not a party to it.

Q. But I understood you to state that you did not bother to investigate before you would release the mortgage at the request of the party to whom you had sold it,

about whether the mortgage had been returned by taxation or whether it had not.

A. We did not investigate. (Tr. 4864-4866.) (R. 789.)

It now appears unquestionably and absolutely undebatably that every one of the plaintiff banks who now complain that others are not taxed as they are taxed, participated in and were parties to an organized, common, deliberate method of preventing the public from being advised as to assessable property and thereby to defeat the public from collecting taxes from the persons who legally and under their honor were duty bound to pay. If that is not improper conduct, it possibly cannot be improper conduct on the part of the county to fail to exact taxes from taxpayers and that is the thing the plaintiffs complain of and upon which their whole suit relies. In other words, the plaintiffs complain that the taxing bodies have not been exacting their full measure of revenue from potential taxpayers and that, therefore, the plaintiffs are entitled to equitable remedy because they have been imposed upon. Now it appears from the plaintiffs' own testimony in each particular case that the public has been defeated in its efforts to collect public revenue because of the conspiracy or silent but active co-operation on the part of the plaintiff banks with tax dodgers.

It is no answer for the plaintiffs to say that that misconduct on their parts does not have anything to do with the failure of the taxing bodies with relation to the rate of levy because these acts are inseparable. The plaintiffs in each case complain that they are denied the equal protection of the law because others are not required to pay the proper amount of taxes. That particular act, to-wit: the failure to collect the proper amount of taxes was in part due to the illegal, immoral conduct of the plaintiff banks and if in any measure they have contributed to the situation of which they

complain, their complaint will not reach the listening ear and the Court of Conscience will refuse to extend its arm to assist the complainant.

There is another phase of this question which is properly presentable to the Court, both under the question of failure on the part of the plaintiffs to do equity and as a question of laches and that is: THE PLAINTIFFS KNEW OF THEIR COMPLAINT AS TO METHOD OF TAXATION BUT SAT IDLY BY, PERMITTING THE TAXING BODIES TO LOSE THE REVENUE WITHOUT THE ASSISTANCE OF THE PLAINTIFFS, AND THE PLAINTIFFS, INSTEAD OF PILING UP A MASS OF CLAIMS, WERE IN EQUITY DUTY BOUND TO ASSIST THE COMMUNITY TO PREVENT A LOSS INSTEAD OF AGGRAVATING A LOSS.

It is undoubtedly, even under plaintiffs' contention, the purpose of the statutes of Iowa and consented to by Section 5219, that all the plaintiff banks and competing capital should pay taxes under the general millage levy. The plaintiff banks complained not that they paid too much taxes but that others paid too little and seek the remedy not of compelling others to pay the full amount of taxes but to return to the plaintiffs what they deem a disproportionate excess.

The plaintiffs have no basis of complaint except in equity and if the basis of complaint is that the other taxpayers did not pay enough taxes, it should have brought its action when the remedy could have been obtained to compel the proper levy against the voting taxpayer rather than to sit by and permit the loss of taxes to accumulate and then on the other taxpayer's wrong, receive a reduction rather than to create a proper revenue for the taxing bodies.

Further, each institution knew the taxing bodies were levying and spending the moneys as and when received and incurring obligations in anticipation of the amounts to be received and probably making improvements that otherwise could not be undertaken.

CENTRAL STATE BANK.

Mr. McPherrin, the president, testified that it was brought to the bank's attention in 1919 that there was a question about the taxes and in 1919 the bank believed it had objections to the taxes and in 1920 and 1921 and 1922, but instead the bank paid the amount required for taxes set up in a reserve, and did not pay the taxes until November 30, in 1923. The bank knew that the taxes were levied for immediate and anticipated expense and that the moneys received would be distributed in governmental expense and that the money paid would be long distributed prior to September 14, 1925, the date the law suit was begun. (Tr. 4445-4449.) (R. 753.)

IOWA NATIONAL BANK AND DES MOINES SAVINGS BANK AND TRUST COMPANY.

Mr. Clyde Brenton, an officer, testified: As far back as January 1, 1919, it was discussed among the officials of the bank that the bank was being illegally assessed in that there were other people the bank considered in competition who were not being assessed at the same rate. (Tr. 4895-4896.) (R. 787.)

PROPOSITION XIII.

The Suits Should Have Been Brought by the Stockholders.

The proper plaintiff to recover taxes is the person who is ultimately entitled to the money.

37 Cyc., 1187.

In a suit by a national bank to recover back taxes paid on its real estate, where the real estate had not been deducted

from the value of the shares, held the wrong was to the stockholders and the banks could not maintain the suit.

Board v. First National Bank, 57 N. E., 728.

Payment of tax on shares by the bank is, in effect, payment by the stockholder.

Primghar Bank v. Rerick, 96 Iowa, 238.
Head v. Board of Review, 170 Iowa, 300.
First Nat'l Bank v. Council Bluffs, 182 Iowa, 107.
Andrew, Supt. v. Munn, Treas., 218 N. W. 526.

A state law authorizing persons against whom claim is made to bring action against claimant, to determine claim, held, to give bank no right to bring action to enjoin County Treasurer from collecting portion of taxes assessed upon its stock.

First National Bank v. Patterson, 176 Pac. 498.

Payment of taxes on a stockholder's shares of stock is in effect the declaring of a dividend by the bank.

Redhead v. Iowa National Bank, 127 Iowa 572.

A consignee cannot maintain an action to recover back taxes paid by him on goods held on consignment.

Stickney v. Bangor, 30 Me. 404.

The taxes on the shares of stock are the taxes of the stockholders and can only be recovered by them.

The shares must be assessed as the property of the owner, and the payment of the shares by the bank is, in effect, the payment by the stockholder.

Primghar Bank v. Rerick, 96 Iowa, 238-242-4.

In a case holding that a county treasurer could not recover taxes on the stock of a bank, from the bank, unless it

was shown that the bank had property of the stockholders in its possession, our Supreme Court says:

> "A stockholder in a national bank cannot be taxed upon his stock at a greater 'rate than is assessed on other moneyed capital in the hands of individuals'. Code Section 818. This authorizes the stockholder to deduct from the cash value of his stock the amount of his valid debts."
> *Farmers Nat'l Bank v. Hoffman*, 93 Iowa, 122-4-5.

Though the bank may pay the taxes, this is done, not on its behalf, but for the shareholders.

1st Nat. Bk. v. Council Bluffs, 192 Iowa, 107-14.

Though the bank may pay taxes, this is done, not on its behalf, but for the shareholders. Neither the corporation nor its property is assessed.

Head v. Board, 170 Iowa, 300-5-6.
Sec. 7235, Code 1924, as to Refund of taxes.

We have already pointed out the authorities holding that it was the stockholders who were assessed and not the banks, and that therefore the stockholders are the ones who are entitled to recover. We would like to apply a little further the law as laid down in the cases, to the facts as developed in the cases at bar. The lists of stockholders of the various banks in the various years will be found beginning on page 124 of Appellees' Denial of Abstract and continuing to page 146 now pages 1197-1205 of the printed record. We will not take the time or space to go through the statements of all of these banks in order to show that there was a material number of stockholders who owned stock at various times during the period that these taxes were paid who are not now stockholders in the banks. A statement as to the stockholders of the Central State Bank is typical of all of them. Taking first Exhibit "Z-204" which is a list of the stockholders of the Central State Bank as of September 15, 1925, more than a

year before these suits were brought, in that list there were all together approximately one hundred and five stockholders. Forty-four of these one hundred and five stockholders owning six hundred and one shares of stock out of a total of twenty-five hundred shares were not stockholders on January 1, 1919. Turning to Exhibit "Z-199" the list of the stockholders whose stock was assessed as of January 1, 1919, we find that 20 stockholders out of 76 who owned seven hundred and seventeen shares out of a total of twenty-five hundred shares in 1919 were not stockholders in 1925 or when the suit was brought. In other words, almost one-third of the stock that was outstanding on January 1, 1919, was not owned when this suit was brought by the parties who owned it in 1919. A checking through of the statements of the other banks would show practically the same situation so that even if we should be wrong in our contention that the banks cannot represent even the stockholders who were stockholders in 1919 and the other years when the taxes were paid, and who were still stockholders when the suits were brought, we are certainly right in our contention that the bank cannot by any stretch of the imagination represent the stockholders who are no longer connected with the bank. And the above evidence shows that the stockholders who are no longer connecfed with the bank are a substantial number and represent a substantial amount of the capital stock.

Nor is it reasonable that the banks [redacted]d claim or pretend to represent the stockholders who actually paid the taxes. The impracticability of the theory, that the banks represent stockholders who are no longer connected with it, has been thoroughly illustrated by what has occurred during the pendency of this very case.

The Iowa National Bank and the Des Moines Savings Bank and Trust Company in the first instance consolidated with the Des Moines National Bank and organized an ap-

parently new corporation under the name of Iowa-Des Moines National Bank. On top of this, however, there was another amalgamation or *quasi* consolidation, by which the stock or at least a majority of the stock of the combined bank was sold to a corporation known as the Northwest Bancorporation. The understanding being, according to the newspapers, that any stockholder in the Iowa-Des Moines National Bank could exchange so many shares of his stock for so many shares in the Northwest Bancorporation. If, therefore, the Iowa National Bank and the Des Moines Savings Bank are entitled to recover instead of the stockholders either for themselves as corporations or for the benefit of the present stockholders, the money when obtained would have to be paid over by them, at least more than one-half of it, to the Northwest Bancorporation, a corporation which had nothing to do with the matter at the time when the taxes were levied and paid. We merely use these recent events as an illustration to show what a precarious position even the present stockholders of these banks would be placed in if it should be found that the banks are entitled to recover these taxes for themselves rather than for the stockholders. In other words, the acts of these banks themselves since this suit was brought has conclusively shown that the banks' claim that they are entitled to maintain these suits as banks cannot be maintained. Nor can the proposition that they have a right in some mysterious way to represent even the present stockholders in the bank be followed out to a logical conclusion without coming against insuperable obstacles. How can the court be assured that the consolidated bank will pay over to the former stockholders of the former Iowa National Bank the money recovered by it for them in this case? And if they do not so turn it over how are the respondents in this case protected from subsequent suits by the stockholders themselves to recover the same taxes?

As heretofore briefly pointed out, the evidence shows definitely that during these years all of the banks declared dividends in each year over and above the amount that they paid out for taxes, in addition to that passing large amounts of undivided profits to surplus. So that it conclusively shows that the taxes in each year were paid out of the undivided profits which would otherwise have been declared as dividends to the stockholders.

The banks therefore had no claim against the stockholders for any refund as the taxes were paid in the first place out of the money of the stockholders which would otherwise have gone out to them in dividends or been placed in the surplus.

The tax is levied against the stockholders upon their shares of stock. It has repeatedly been held that this is not a tax against the bank, but is only a tax against the stockholders. The stockholders are the ones primarily liable for this tax. The banks are only secondarily liable to the extent that they have property belonging to the stockholders in their hands. If the taxes, therefore, were erroneously assessed and paid, the money so paid belongs to the stockholders and could only be recovered by them, or their assignee. There is no claim in this case that the right to recover back these taxes had been assigned by any of the stockholders. The evidence shows that many people, who were stockholders when the taxes were assessed and paid, were no longer stockholders at the time this suit was brought, or at the time the claim was made to the Board of Supervisors to recover back the taxes. Even assuming, for the sake of the argument, that the bank might represent the stockholders, who were stockholders when the taxes were levied, and who are still stockholders, it certainly could not represent the stockholders who paid the taxes years ago and are no longer stockholders in the bank. There is, therefore, a defect in parties plaintiff, at least to this extent.

Even though these taxes were paid by the banks originally, it has, in effect, been refunded to the bank by the stockholders, for the simple reason that the bank paid the taxes out of their undivded profits which would otherwise have been declared as dividends or passed as surplus. In either case, the stockholder paid the taxes, because the book value of his stock was decreased exactly by the amount of the taxes paid. When he sold his stock, he sold it on this depreciated basis, and, therefore, there has never been refunded to him the amount which he paid for these taxes, either by the bank or by the person who purchased his stock. The right to recover these taxes, therefore, if they have been erroneously taken away from him, rests in the stockholder alone. The evidence shows that all of these payments were made during a period when they paid out large dividends, or put large amounts to the surplus during the same period, more than enough to have paid these taxes. All the property of the bank, therefore, over and above its debts and liabilities, belonged to the stockholders and it was out of this balance, existing over and above its liabilities, that the bank, in each instance, paid the taxes. The taxes were, therefore, paid out of the property of the stockholders and it is mere quibbling to say that, because the bank did not declare the larger dividend, in the first place, and then deduct the taxes out of the dividends, the taxes were not paid by the stockholders. The officials of the banks themselves admitted that the method pursued, arrived at exactly the same result as far as the book value of the sharea was concerned, as if they had set aside a fund for paying taxes, which was made up out of deductions from the dividends declared to the stockholders, or as if they had declared the dividends and each stockholder had paid back enough to pay the taxes.

PROPOSITION XIV.

Would the Five Mill Levy, If Properly Applied to Banks, Have Produced Less Taxes Than the Basis Upon Which They Were Assessed?

If the plaintiff banks had been assessed five mills on the dollar on all of their moneys and credits, as shown by the evidence in this case, the tax would have been much more than the amount that they were compelled to pay under the assessment complained of.

The amount actually paid by the banks, on their present assessment, is much less than a five mill assessment, without deduction of debts. Therefore, individuals, who had no debts to deduct, paid a higher rate than the banks. There is no showing that many of the individuals, whose assessment rolls were offered, had any deductions. Therefore, their rate was higher than the rate at which the banks were actually taxed, because, in the method provided by the statute and under which the banks were assessed, they have a right to deduct, not only all of their debts, but all of their real estate and their amount due depositors. The amounts due depositors by the banks is not a debt. It has so been held by the courts. The banks were the actual owners of all the moneys and credits in their possession. They became the owner of all the money deposited with them. Of course, they must pay it back, under certain circumstances, but, as long as they held it, they were the owner, and the courts have so held. If, therefore they were required to pay upon all the property owned by them and allowed to deduct their actual debts, such as bills payable and accounts payable, but could not deduct the amount of their deposits, which are not debts in that sense, then the amount of the tax they would have been required to pay on the five mill levy would have been much in excess of the tax they did

pay under the present assessment. So they have nothing to complain of, on that ground, and would not be any better off if the five mill levy had been applied to them. The individual who had a hundred thousand dollars loaned out on mortgages, and who had no debts to deduct and who was assessed five mills on the dollar, on the whole hundred thousand, would pay $500.00, a much higher tax than a bank which had a hundred thousand dollars invested in mortgages, $15,000.00 of which was its capital and $85,000.00 of which was deposits or depositors' money, if the bank was assessed on the same basis on which the banks were assessed in this case, namely, with deposits deducted and the consolidated levy of 134 mills applied to 20% of the remaining capital as it would only pay $402.00. As a matter of fact, therefore, there was no discrimination against the banks in assessing people who had no debts to offset against their mortgages on the basis of five mills on the dollar, even if they were in competition with the banks.

The petitioner has not been hurt by the imposition of the tax complained of. This is true for at least two reasons. In the first place, petitioner is not assessed upon the capital that is actually employed by it in its business as it should be if it were assessed as moneys and credits, but is assessed only upon the capital, surplus and undivided profits less the real estate. The record shows, and it is without dispute, that the great part of petitioner's capital is composed of the deposits. If it were not for the deposits, petitioner could not and would not operate in the manner it does and could not make the profit that has been realized by it upon its stock. Yet petitioner pays no tax upon this capital which exceeds by many million the amount of the bank's capital, surplus and undivided profit upon which it is taxed. If the deposits were added to the bank's capital as it is now assessed, and it were all taxed as moneys and credits, the amount which

petitioner would be required to pay would far exceed the payments under the rate it is now assessed.

Then too, it is pertinent to inquire how much have the taxes of the petitioner been increased because of the alleged discrimination. There is no showing that they have been increased or that any unjust burden has been imposed upon them. The other taxpayers in the taxing district must of necessity share in any additional burden because of the alleged discrimination. The taxes paid by the other taxpayers far exceed that paid by petitioner.

In fact, taxes paid by petitioner are but a fractional part of all the taxes paid in the taxing district as was shown by the evidence. We believe it is impossible for petitioner to show in dollars and cents that it has been hurt at all by the alleged discrimination. In any event the record is barren of such evidence. If it is granted relief the other innocent taxpayers who have paid their full share of taxes will have to pay these recovered taxes to the bank. What equity is there in this, the other taxpayers have done no wrong.

In the absence of a showing for either of the reasons urged, that plaintiffs have been hurt, under the well established and recognized rules of law, they cannot question the unconstitutionality of the proceedings.

PROPOSITION XV.

The Actions Are Barred by the Statute of Limitations.

The question under the Statute of Limitations, aside from the question that arises in some of the cases as to the taxes for the year 1919, is, whether or not, Sub-division 4 of Section 11007 of the Code, containing the three year limitation in actions against a sheriff or other public officer, applies to these cases. It would seem to us that there is reasonable ground for holding that the three year statute does apply,

for the ground of recovery in this case is based on the omission of an official duty upon the part of the Auditor and Treasurer in not properly assessing the alleged competing companies. Or, if not an act of omission, then the act of the Auditor in changing the assessments so as to assess the alleged competing capital as moneys and credits. In view, however, of all the other questions under which we believe the case should be decided in favor of the defendants, we will not make any extended argument on the question, but merely suggest it for the consideration of the court.

Section 11007 of the Code of Iowa, Subdivision 4, reads as follows:

> "11007. Period of. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared: * * * 4. Against sheriff or other public officer. Those against a sheriff or other public officer growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the nonpayment of money collected on execution, within three years."

See also the following case decided by the Supreme Court of Iowa:

Murphy v. Supervisors, 215 N. W., 744.

PROPOSITION XVI.

No Evidence of Competition—Relating to Assessment for 1919.

The years and assessments and taxes paid in question in this case are:

Assessments for the years 1919, 1920, 1921 and 1922.
(R. 0003—Par. 5 of Petition.)

Taxes paid for the years 1919, 1920, 1921 and 1922.
(R. 0015—Par. 27-28 of Petition.)

Shares of corporation stock shall be assessed at the value on the first day of January of each year. (Iowa Code, 1897—Section 1323.) While this section refers to Iowa corporations, it is provided by Iowa Code 1913 Supplement, Section 1366, the assessment roll is to be completed and laid before the board of review "on or before the first Monday of April in each year".

The assessor begins his work and the assessors meet before January 13th of each Year (Iowa Code 1897—Section 1359).

It follows then the classification of the business is unavoidably based on transactions prior to the assessment. As a result in 1919, it was the business as it was conducted in 1918 that determines the classification of the business for 1919 assessment. It is not, as relates to the 1919 assessment, material what any company did as business in 1919. It is the business done in 1918 that determines its character as to the classification of the assessment for 1919.

There is absolutely no testimony of any kind or character by inference or otherwise to show the business of the plaintiff bank or any of its alleged competitors in the year 1918.

We could not object to the testimony of business done in 1919, 1920 or 1921 for this reason, as testimony for those years was relevant because of its effect upon the assessments for the years 1920, 1921 and 1922 respectively, but we did object to the admission of the assessment rolls for the 1919 assessment because there was no evidence as to character and amount of business done in 1918. We did, upon the trial continuously and consistently, object to testimony as to business methods in the year 1922.

The record, page 0351, shows this objection:

"The following evidence was received subject to the specific objection by counsel for defendants that the business carried on by the bank in 1922 is immaterial and beyond the issues of the case."

We respectfully submit, it is plain that there is no evidence of any competition for the period existing just prior to and at the time of the assessment and therefore there is nothing on which anything can be based as a claim of recovery of the taxes, penalties and interest for the taxes for the year, 1919.

PROPOSITIONS XVII AND XVIII.

Not a Final Judgment.

The petitioners herein have not obtained a final judgment in the court of last resort of Iowa and are not therefore entitled to a writ of certiorari in this honorable Court. The record herein discloses that the petitioner, within the time prescribed by the statutes of Iowa, filed its notice of intention to file a petition for rehearing with the Supreme Court of Iowa. The respondents have also filed notice of intention to file petition for rehearing in the Supreme Court of Iowa. The record as shown by the certificate of the clerk of the Supreme Court of Iowa on pages 1409-1414 of the printed record shows that the matter is undisposed of and still pending so far as the record shows. Under the statutes of Iowa it is discretionary with the Supreme Court of Iowa whether they will grant a rehearing or not. If a rehearing is granted and the Supreme Court of Iowa so determines, it may decide the case anew and reach an entirely different result from the decision on which petitions for rehearing were to be filed. The petitioners herein may, in the event of a rehearing in the Supreme Court of Iowa, thus obtain a decision favorable to their contention and granting them the relief

demanded. Until the Supreme Court of Iowa has exercised its discretion as to whether or not a rehearing will be granted, a decision therein is not final in the event a petition for rehearing has been filed. This honorable Court has passed upon the question here presented on several occasions. In *Andrews v. Virginian Ry Co.*, 248 U. S. 272, at 275 it is said:

> "It is true that under the law of Virginia in a case like this the power of a court of appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date, or because so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court. Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material, therefore, to the exercise by this court of its rightful authority. * * *"

In *Citizens Bank v. Opperman*, 249 U. S. 448, 450 this honorable Court said:

> "Where a petition for rehearing is entertained the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of and the three months' limitation begins to run from date of such denial or other disposition."

So in the case at bar notice of intention to petition for rehearing having been filed, the petitioner herein is not entitled to certiorari until the petitions for rehearing have been filed and finally disposed of.

The petitioner by filing its notice of intention to file a petition for rehearing has again invoked the action of the Supreme Court of Iowa, and if its petition is filed there is no

final judgment until the same is acted on by the Iowa court. If the petitioner does not file its petition for rehearing in compliance with its notice, then, in effect, after invoking the further action of the Iowa court and setting the machinery in motion by its notice, it has abandoned or dismissed the same, which is equivalent to accepting and acquiescing in the judgment of the Iowa court. It would be in the same position as if, after appealing originally to the Supreme Court of Iowa it had voluntarily dismissed its appeal, thus by its own action preventing a final decision by the highest court of the state, such as is required to entitle it to come to this court by certiorari.

There is also no final decision until the procedendo has been sent down by the Supreme Court of Iowa to the District Court. The record not only fails to show that the procedendo has been sent down, but on the other hand it shows positively that it has not been sent down. At the request of petitioner an order was entered by the Supreme Court that the procedendo should *not* issue for the present. See Page 1399 of printed record. By this very action petitioner has recognized that if the procedendo had been sent down it would have had a final judgment against it as to which it could do nothing further in the State Courts. By requesting the Supreme Court not to send down the procedendo it in effect requested that court to retain jurisdiction so that it could make further orders in the case if desired, and it also thereby prevented the judgment from being final in such sense as to give it the right to appeal to the Supreme Court of the United States, under the rulings of that court.

In conclusion we wish to expressly call the court's attention to the case of

Nelson v. First National Bank of Sioux City, 42 Fed. (2nd) 30,

decided by the Circuit Court of Appeals of the 8th Circuit on June 26, 1930. We have already cited this case as supporting our proposition that the petitioner in this case had not exhausted all of the administrative remedies furnished by the Iowa law.

We desire to dwell at a little further length on this case for the reason that not only is it an authority on that proposition but also is authority on some other points in this case.

We particularly wish to draw attention to it because of the statement made in that case as to the case of

Munn v. Des Moines National Bank, 18 Fed. (2nd) 269,

which is relied upon so strongly by counsel for petitioner in the present case and which case was also decided by the Circuit Court of Appeals of the 8th Circuit. The Circuit Court of Appeals in the *Nelson* case says that the *Munn* case cannot be considered as an adjudication or finding that a right to appeal from the Assessor to the Board of Review was an inadequate remedy, that the decision in the *Munn* case was based upon the peculiar facts in that case. Facts, as we have heretofore set out, which are radically different from the case at bar. In the case at bar the petitioner knew of this alleged discrimination against it and knew it was occurring each year as far back as the year 1919, and made no effort whatever to have it remedied by the Board of Review. If its officers knew in 1919 they were being discriminated against they then had a whole year in which to have found out if they did not already know, as they said they did, in whose favor this discrimination was being exercised. And it would have been a matter of very little work to

have discovered or checked up between January 1, 1920 and May 1, 1920, when the Board of Review met, to see whether or not these same discriminations had been made during that year, and so on during the succeeding years. The record in this case shows that practically the same persons and corporations appeared in the evidence offered by the petitioner, in each of the years as to which complaint was made, as being favored or as to whom discrimination was made against the petitioner. Of course, a few of them did drop out each year and a few would come in, but generally the discriminations were in favor of the same persons and corporations during each of the years as to which complaint is made. So that the petitioner in this case had ample information and opportunity to have presented the matter to the Board of Review and have asked that on account of such discrimination its assessment should be as moneys and credits.

The *Nelson* case was one where relief was sought by injunction and the Court held that as to the years in which they might have appealed to the Board of Review but did not the petitioners could have no relief. One of the banks, however, for one year did take such appeal to the Board of Review and the Circuit Court of Appeals held that that bank as to that one year was not prevented from taking the matter up with the Federal or State Court. That whether it sought relief from the state court or the federal court it was no longer administrative process but judicial. In the case at bar the petitioner in most of the years did not, while it took an appeal to the Board of Review, raise the question now raised in this suit as to discriminations. It possibly, in one year, did raise the question of discrimination against it. In the other years it did not. However, instead of them taking the case for injunctive relief to either the Iowa Courts or Federal Courts it further followed the provision of the

Iowa statute and appealed to the Iowa Court and the appeals to the Iowa Court, whether it raised this question or whether it did not, were all decided against it, and it carried the matter no further. So that in the cases where it did not appeal to the Board of Review it cannot now have relief under the rules laid down in the *Nelson* case and in the year that it did raise the question of discrimination it sought its relief in the State Court and such relief was there denied and the suit dismissed so that there is an adjudication against it for that year. Therefore, under the rules as announced in the *Nelson* case there can be no recovery here on the part of the petitioner.

There is, however, another point decided by the *Nelson* case which would deprive the petitioner of relief also, and that is that the remedy sought here for repayment of taxes erroneously paid or illegally exacted under Section 7235 of the Code of Iowa, 1924, is not available to the petitioner in such a case as this. That that statute only applies where the officer or officers had no authority to levy a tax or it was in some other respects illegal and does not include such a case as this where the property was erroneously taxed. In the case at bar it was an irregular and not an illegal tax and, therefore, the petitioner could not pursue the remedy he is pursuing in the case at bar.

We submit, therefore, that our claim that the petiitoner is not entitled to recover in this case and that the finding of the Supreme Court of Iowa should be approved and affirmed is amply established by the facts and the authorities cited, and on more than one ground. We do not wish, however, to convey the impression that by only mentioning in this conclusion some of the grounds that prevent petitioner's recovery that we wish to minimize or abandon the others and we are insisting upon all of the grounds alleged, including the matters of practice, that the petitioner has not

pursued his remedy in the state court to a conclusion and that no final judgment has yet been entered from which he could come by certiorari to the Supreme Court of the United States. Certiorari of itself is predicated upon and presupposes that all administrative remedies have been exhausted and the indisputable facts show they have failed to follow and exhaust all their administrative remedies.

Respectfully submitted,

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GEORGE A. WILSON,
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on the Brief.

APPENDIX.

13 Corpus Juris 444; Section 381.

"Interference with Duties of Quasi Public Corporations. The general rule has been laid down that any contract of a corporation by which it disables itself from performing its duties to the public, or subordinates to its private interests the rights and conveniences which it impliedly undertakes to secure to the community, is invalid as contrary to public policy. So agreements by railroad companies and other common carriers, water and gas companies, and other quasi public corporations owing duties to the public, which interfere with the performance of such duties, are illegal and void as being contrary to public policy, the question not depending on whether the public has in the particular case suffered any detriment, but on whether the contract is in its nature such as might be injurious to the public. This principle has been applied, for example, to an agreement or combination by or between railroad companies leasing or conveying property necessary to enable them to perform their duties to the public, or discontinuing a line, etc.; to an agreement between two connecting railroad companies that one should discontinue the use of a part of its road by which it has long been connected with a line of steamboats at tidewater, which was one of its termini under its charter, and that the other should use its influence to prevent the extension of a third road which would interfere with the business of the first one; and to agreements by which a railroad company binds itself not to build its railroad along a particular route, to locate, or not to locate its station or depot at a particular point, or to locate it at a particular point; or to furnish or not to furnish sidings, unless, according to some of the cases, where the agreement is to locate along a particular route or at a particular point, it is not restricted from locating lines, stations, or depots along other lines, or at other points also, or otherwise doing whatever the public convenience may require. Contracts by common carriers and other quasi public corporations making undue discrimination in favor of particular persons are generally prohibited by statute, but they are also illegal as contrary to public policy."

38 Corpus Juris 770; Section 412.

"Necessity of existence of funds. Mandamus will not issue to compel the payment of a claim against a municipality where no appropriation has been made for such payment, or where there are no funds on hand applicable to the payment of the claim; and funds appropriated for one purpose will not be compelled to be devoted to another, although, where designated claims are required by statute to be paid out of a "general fund" the fact that a special fund has been set apart for payment of such claim and had been exhausted will not prevent the issuance of mandamus to compel payment of such claims out of the general funds. Where the funds are not on hand, mandamus to pay when the funds shall be received cannot issue. The rule that mandamus will not issue to compel an officer to perform has been applied to prevent the issuance of a mandamus to compel the payment of a claim from a fund properly applicable to the indebtedness where such fund has been wrongfully dissipated or diverted; but there are decisions that hold that mandamus will issue notwithstanding the fund from which payment should have been made had been wrongfully appropriated or diverted to other purposes, provided it is clearly made to appear that the officer against whom the writ is sought actually received moneys from which the claim would be payable."

1913 Code, Section 1366. (Supplement).

"Assessors" books returned. That section thirteen hundred sixty-six of the code be and the same is hereby repealed and the following enacted in lieu thereof:

" 'Such rolls shall be laid before the local board of review on or before the first Monday of April in each year for correction, and when such correction has been completed, the assessor shall proceed to make up the assessor's books in duplicate from such assessment rolls, allotting a sufficient number of pages to each letter, and return to the county auditor, together with the assessment rolls, plat book, and all statements which have been furnished to him in connection with the assessment, and the county auditor shall foot up each column of numbers and values on each page and enter such footings in recapitulation sheets, and not later than the

tenth day of May return one of the books to the township clerk, and to the city or town clerk.'"

1897 Code, Section 1359.

"Meeting of assessors. The county auditor of each county shall, before the third day of January annually, issue a call to all the assessors of his county to meet at his office, or some other place at the county seat, within ten days for consultation, and to receive from such auditor such information as shall tend to the proper discharge by them of their official duties. It shall be the duty of each of such assessors to attend such meeting, and they shall be allowed pay of one day for such attendance, and mileage at six cents per mile one way."

1897 Code, Section 1323.

"Shares of corporation stock. The shares of stock of any corporation organized under the laws of this state, except those which are not organized for pecuniary profit, and except corporations otherwise provided for in this act, shall be assessed to the owners thereof, at the place where its principal business is transacted, the assessment to be on the value of such shares on the first day of January in each year; but in arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them, either in this state or elsewhere, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation, except real estate situated within the state, shall not be otherwise assessed. Every such corporation annually, on or before the twenty-fifth day of January, shall furnish to the assessor of the assessment district in which its principal place of business is located a verified statement, showing specifically, with reference to the year next preceding the first day of January then last past:

"1. Total authorized capital stock and number of shares thereof;
"2. Number of shares of stock issued and par value of each;
"3. Amount paid into the treasury on each share and the total capital paid in;

"4. Description and value of each tract of real estate owned by said corporation;
"5. Date, rate per cent and amount of each dividend declared, and the amount of capital on which each such dividend was declared;
"6. Gross and net earnings, respectively, during the year, and the amount of surplus;
"7. Amount of profit added to sinking fund;
"8. Highest price of sales of stock between the first and tenth days of January of the current year;
"9. Highest price of sales of stock during the preceding year and average price of such sales."

1897 Code, Section 1417.

"Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter, but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if the property was subject to taxation for any of the purposes of which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale."

1927 Code, Section 7235.

"Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

1924 Code, Section 12440.

"Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the perform-

ance or omission of which the law enjoins as a duty resulting from an office, trust or station."

1924 Code, Section 12441.

"Discretion—exercise of. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discretion."

1927 Code, Section 12452.

"Form of order—return. The order shall simply command the performance of the duty, shall be directed to the party, and may be issued in term or vacation, returnable forthwith, and no return except that of compliance shall be allowed; but time to return it may, upon sufficient grounds be allowed by the court or judge, either with or without terms."

1927 Code, Section 12456.

"When writ may issue. The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy."

1924 Code, Section 7149.

"Corrections by auditor. The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property."

1924 Code, Section 6992.

"Stock and 'moneyed' capital denied deduction. No deduction for debts shall be allowed from the shares of stock of any state, savings or national bank or loan and trust company, nor from moneyed capital used in competition with banks, within the meaning of section 5219 of the revised statutes of the United States."

1924 Code, Section 11007.

"Period of. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

"1. In actions for injuries from defects in roads or streets—notice. Those founded on injury to the person on account of defective roads, bridges, streets, or sidewalks, within three months, unless written notice specifying the time, place and circumstances of the injury shall have been served upon the county or municipal corporation to be charged within sixty days from the happening of the injury.

"2. Penaltes or forfeitures under ordinances. Those to enforce the payment of a penalty or forfeiture under an ordinance, within one year.

"3. Injuries to person or reputation—relative rights—statute penalty—setting aside will. Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years; and those brought to set aside a will, within two years from the time the same is filed in the clerk's office for probate and notice thereof is given; provided that after a will is probated the executor may cause personal service of an original notice to be made on any person interested, which shall contain the name of the decedent, the date of his death, the court in which and the date on which the will was probated, together with a copy of the will; said notice shall be served in the same manner as original notices and no action shall be instituted by any person so served after one year from date of service.

"4. Against sheriff or other public officer. Those against a sheriff or other public officer, growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the payment of money collected on execution, within three years.

"5. Unwritten contracts—injuries to property—fraud—other actions. Those founded on an unwritten contract, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years.

"6. Written contracts—judgments of courts not of record—recovery of real property. Those founded on written contract, or on a judgment of any courts except those provided for in the next subdivision, and those brought for the recovery of real property, within ten years.

"7. Judgments of courts of record. Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years.

"8. Judgment quieting title. No action shall be brought to set aside a judgment or decree quieting title to real estate unless the same shall be commenced within ten years from and after the rendition thereof."

1927 Code, Section 12880.

"Petition for rehearing. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing."

1927 Code, Section 12881. Subd. 4.

"Rehearing—notice. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe."

1927 Code, Section 12883.

"Petition may constitute brief and argument. The petition may be made the argument or a brief of authorities relied upon for rehearing. The adverse party may file a printed argument in response. If the party applying for a rehearing shall give notice of oral argument in his petition, then both parties shall be entitled to be heard orally, unless the party giving notice waives argument."

Rule 27, Supreme Court of Iowa.

If the case is triable upon errors assigned and not *de novo* and appellant has given notice of oral argument, he will be

entitled to open and close. If appellee alone gave the notice he will be entitled to open the argument and appellant must confine his remarks strictly to a reply. If the cause is triable *de novo* the party upon whom rests the burden of the proof may, if he has given the requisite notice, open and close the argument. If he has not given notice he will be confined strictly to an answer to the argument for the other side. No oral argument shall exceed one-half hour in length, unless an extension of time be granted before the argument is commenced or it becomes apparent during the course of the argument that more time is necessary, whereupon the court may grant additional time. On original submission two attorneys may be heard on each side; but in the event counsel opening the argument is not entitled to reply, but one attorney shall be heard for either party. Reply arguments shall be limited to fifteen minutes. On petitions for rehearing only one attorney shall be heard for either party, the petitioner to have not exceeding twenty and the respondent not more than fifteen minutes, unless extensions be granted by the court.